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NO.64-8 (50 I.A.2 69) AGENDA NO. 33

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT.

ALEX RUSICK, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Madison County.
vs.	)	
GUYLA STUART, Defendant-Appellee.	)	Hon. James O. Monroe, Jr., Trial Judge.

REYNOLDS, J.

This is a suit for damages growing out of a collision between the automobile of the defendant Guyla Stuart and the automobile of Alex Rusick, the plaintiff. The collision was what is called a "rear-end collision" with the automobile of the defendant striking the rear of the automobile of the plaintiff. Defendant admitted liability, and the only issue presented to the jury was the amount of damages. The jury assessed plaintiff's damages at $500.00. In plaintiff's post trial motion and in this appeal, plaintiff contends that prejudicial misconduct on

the part of the defendant's attorney and the trial judge resulted in a jury verdict of inadequate damages.

In plaintiff's brief, the portion of the argument of defendant's attorney complained of is set out in detail as follows:-

"Mr. Boman: And that is, you can approach the thing about the same way as when you pick up the newspaper and you see about a two or three-line story, and that is what type of a case this is. That somebody, Mrs. Stuart in this case, had a minor accident on the Junior High School grounds with a man named Rusick. And that is all in the world attention the newspaper would give it, and here we are for a day and a third or so on it.

And you are not required to think because it's here, it's any different than if you had heard it from one of your friends over the telephone who may have known one of two parties or heard about it by reading the newspaper. It's a minor, small case being built up.

Mr. Moran: Now, your Honor, I am going to object to it.

Mr. Boman: I wish I wouldn't be interrupted.

Mr. Moran: I wish you would admonish counsel that I have a perfect right to make objections. This is a rule of court. And I should not be criticized when I do it. Now he said this was

a built-up case. And he is comparing it to newspaper columns, and I object to it.

The Court: Objection is overruled. Proceed.

Mr. Boman: I may say we have to get used to this thing, because every time I have argued a case with Mr. Moran he did the same thing.

Mr. Moran: I object to that, your Honor.

The Court: Objection is overruled.

Mr. Moran: He is calling other cases not in evidence.

The Court: Let's allude to this case only.

Mr. Boman: See if I am not right. Now we will try to get back on the thought that Mr. Moran would have us interrupt. Any objection?

Mr. Moran: I quit objecting, Howard. It doesn't do me any good.

Mr. Boman: I appreciate that for once. This is a minor case in which a big dollar sign is put on it. Now let's just look at the case. There isn't any screening process as there is in a criminal case where somebody looks over cases and decides whether they have merit or don't have merit before they get up here in the Circuit Court in the civil side. Now we all know in the criminal side all cases that you might be called up to try as jurors would have to go through a grand jury, and a grand jury would see if there is any substance to the case.

Mr. Moran: Do I have to object to a referral to a grand jury report?

Mr. Boman: I am going on any way. If he wants to talk behind me you can listen to me or listen to him. I don't care. He has his time later on. All these things have a purpose, I may say. This isn't the first time.

But let me continue, if I can, in good temper. That there isn't anybody who has screened this case and says there is substance or no substance. All it takes in the world to file a case like this or any others is to pay the filing fee of twenty-five dollars. That is all in the world it is. A paper is filed; it is not even under oath. A summons is issued by the Sheriff to go out. They serve this lady and we are in here. That is the next step.

This is the first time that we have to say it is over-blown or some other feature of the case.

Now the Judge sits up here, but he doesn't rule on questions of fact. That is, no matter what he thinks, and he will tell you this, in an instruction, I feel sure. That if Mr. Rusick is testifying about after his golf game his neck hurt, and that came from the automobile accident, and that is what he claims, the Judge doesn't intervene and say, now, now, Mr. Rusick, that is going pretty far afield. He does not and he may not. That is a question of fact for the jury, and it's up to the

jury to decide whether a tale like that should be rejected.

Even if there is perjury, even if there is lying, which is not in this case, the Judge would not intervene at that point. Measures would be taken other places. But I am talking about exaggerations in this case. And I am saying that you are getting this case fresh and cold. It hasn't been worked over before and found to have some merit."

Also, plaintiff contends that during the trial, while counsel for the defendant was cross-examining one Dr. Theis, he asked to look at the doctor's notes. While they were going over the doctor's notes in front of the jury, counsel for plaintiff attempted to look at the notes at the same time. Whereupon counsel for defendant objected and the Court said: "Sit down there unless it's necessary."

The purpose of a summation or argument of counsel is to assist the jury to arrive, fairly and impartially, at the facts submitted to them for decision, and the widest or greatest latitude consistent with precedents, and reasonable interpretation thereof, and consistent with decorum and a reasonable ambition to succeed by honorable means should be given counsel in his closing arguments. However, control and regulation of such arguments rests in the sound discretion of the trial court. Counsel should refrain from indulging in invective, epithets, and abusive or vituperative

language, or from making statements or reflections which have no place in argument but are only calculated to prejudice the jury, such as abusive remarks or comments concerning opposing counsel. Ill. Law and Practice, Vol. 34, pp. 526, 527.

In the case of Levinson v. Fidelity and Casualty Co., 348 Ill. 495, a number of questions were asked that had no bearing on the issues and could only be calculated to prejudice the defendant in the eyes of the jury. The court held these questions to be highly prejudicial. In the same case, it was also complained that counsel indulged in inflammatory remarks and criticism of opposing counsel. The remarks do not appear in the opinion, but the court held that counsel has no right, either by direct charge or insinuation, to attempt to prejudice a jury against opposing counsel.

In the case of Vujovich v. Chicago Transit Authority, 6 Ill. App. 2d 115, counsel for the plaintiff made several unprovoked and prejudicial statements to and about the counsel for defendant, such as:-

"You think you got a monopoly on intelligence. He not only makes an objection, but he makes a misstatement of fact every time he makes an objection. That is very unfair, you see, how he makes it difficult,

he puts a knife in your back.

Judge, I never heard such an asinine objection,"

and others of like tenor. The court in that case held such conduct highly prejudicial and reversed the judgment and remanded for new trial. In reversing and remanding, the court observed:

"We recognize the rule stated by this court in Reinmueller v. Chicago Motor Coach Co., 341 Ill. App. 178, which followed the statement in Walsh v. Chicago Rys. Co., 303 Ill. 339:

"'This Court has said more than once, that in arguing cases to the jury attorneys must be allowed to make reasonable comments upon the evidence. The interest of public justice requires that counsel should not be subjected to unreasonable restrictions in this regard .....'"

and added:

"If the rule with reference to improper inferences were applied as strictly as counsel for defendants urge, it would have a tendency to deprive litigants of the right of having their cases argued, for the prudent attorney would in such case forego argument rather than risk reversible error."

And the court in the Vujovich case continuing, said:

"It will be observed that the rule stated by the Supreme

Court, above quoted, limits such right to "'reasonable comments.'" When, however, the comments are unreasonable and highly prejudicial in character, the rule stated does not apply. We feel that the constitutional right of trial by jury is not a license to counsel to indulge in abusive and prejudicial conduct to gain a verdict, nor does it grant any privilege to embarrass, belittle, and abuse an adversary before a jury to such an extent that the hope of the adversary to obtain respectful consideration at the hands of the jury is destroyed or seriously jeopardized.

Gordon v. Checker Taxi Co., 334 Ill. App. 313; Wellner v. New York Life Ins. Co., 331 Ill. App. 360; Miller v. Chicago Transit Authority, 3 Ill. App. 2d 223; and Keehn v. Braubach , 307 Ill. App. 339, are cases which furnish ample admonition to counsel that a verdict so obtained will not be permitted to stand."

The case of Brant v. Wabash R. Co., 31 Ill. App. 2d 337, is another case where counsel indulged in remarks the reviewing court regarded as such potentially as to have improperly influenced the jury in the assessment of damages. The reviewing court in that case said that while it was reluctant to reverse on the basis of argument of counsel, and while conscious of the fact that the greatest latitude should be permitted to an attorney

in closing argument, within the discretion of the trial court, that it was apparent that in that case the argument went beyond the latitude which should normally be given to counsel.

In the case of Walsh v. Chicago Rys. Co., 303 Ill. 339, counsel on both sides commented unflatteringly about medical witnesses in the case, and the court held that counsel is allowed to make reasonable comments on the evidence and that the interest of public justice requires that counsel should not be subjected to unreasonable restrictions in this regard.

In considering the remarks complained of in this appeal, it must be remembered that while courts may lay down rules and standards for a certain class of cases, each case must rest upon its own particular set of facts. It is undoubtedly the law that counsel may not harass, abuse, belittle, or ridicule opposing counsel to the extent that a prejudice against the cause of opposing counsel may be created in the minds of the members of the jury. Counsel may not indulge in personal abuse of opposing counsel, nor make inflammatory remarks calculated to arouse passion and prejudice of the jury so as to bring about a verdict for his client. In considering the remarks and language of defendant's counsel in this cause, this court is also mindful of the rule that the control and regulation of arguments of counsel to the jury rests in the

sound discretion of the trial court, and this discretion should not be overruled unless clearly wrong.

In reading the portion of the record which is complained of by plaintiff, we find no epithets, invective, abusive language, or vituperative language on the part of counsel for the defendant, directed at either the plaintiff or plaintiff's counsel. Plaintiff's counsel complains that he was criticised by defendant's counsel, when defendant's counsel said, upon objection to argument of defendant's counsel, "I wish I wouldn't be interupted." At another time, he said "I may say we have to get used to this thing, because every time I have argued a case with Mr. Moran he did the same thing." While reference to other cases in which he and Mr. Moran were involved, was probably improper, it is not such a remark that Mr. Moran could properly and justifiably contend that he was belittled, ridiculed or abused, or that the remark tended to prejudice the jury against his client.

A careful review of all the remarks complained of, the objections, and the rulings of the trial court fail to show any such remarks, conduct, or rulings that would constitute reversible error. Undoubtedly, in the heat of the controversy counsel make intemperate and sometimes ill-advised remarks. No trial is completely free of errcr. Despite the sincere efforts of counsel and the court, error does occur. The

questions before a reviewing court is not whether such error occurred, but whether such error is of a character to warrant the reviewing court to reverse. In this regard, the rulings of the trial court must be given considerable weight. The trial court is there and hears the remarks of counsel. He is in a far better position than the reviewing court to judge the effect of such remarks or argument upon the jury. As contended by defendant herein, the printed record does not completely portray the circumstances of a remark. It may be made with a straight face, or it may be made with a smile. It may be said with emphasis, or it may be said in a matter of fact tone. The tone of voice may be important. All these matters are directly within the knowledge of the trial court, because he sees and hears them. In this case, the trial court did not regard the remarks as intemperate, abusive, or otherwise and overruled plaintiff's objections. We cannot say his rulings were in error.

As to the incident when the court told plaintiff's counsel to sit down, we see no error there. Mr. Boman complained of Mr. Moran looking over his shoulder. The court told Mr. Moran to sit down unless it was necessary, whereupon, Mr. Moran stated he wanted to see if Mr. Boman was reading the doctor's notes right. The court told Mr. Moran he could not look over Mr. Boman's shoulder when Mr. Boman was examining the wit-

ness.

As to the damages awarded, the jury determined that question, which determination this court has no right to overrule unless clearly and palpably in error. The question of liability was conceded and the question of damages the only issue. The jury evidently believed that the plaintiff suffered an injury, but that the injury was slight and awarded nominal damages. This court is not in the position to say that the amount awarded was in error.

For the reasons stated, the judgment will be affirmed.

Affirmed.

WRIGHT, J. Concurs.

"DOVE, P. J., An examination of the record convinces me that because of improper argument and conduct of counsel for defendant, the judgment appealed from should not be permitted to stand."

Publish in Abstract only.

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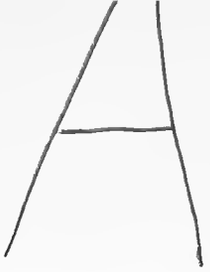

No. 64-17 (50 I.A.2d 70) AGENDA NO. 36

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT.

JUNE STEELE and R. G. STEELE,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Franklin County.
	)	
vs.	)	
	)	
MAX BENNETT,	)	Hon. William G. Eovaldi
	)	Trail Judge
Defendant-Appellee	)	

REYNOLDS, J.

This action arose out of a collision of the automobile of the plaintiff R. G. Steele, driven by plaintiff June Steele, with an automobile driven by Max Bennett, the defendant. The collision occurred at the intersection of Elm and Ida Streets in the City of West Frankfort, Illinois, at about 5:00 o'clock p. m. November 19, 1960. June Steele was traveling west on Elm Street, and Bennett was traveling north on Ida Street. The collision took place near the middle of the intersection, and when the two automobiles stopped, both were near the northwest curb. The plaintiff June Steele sued for personal injuries, and R. G. Steele sued for damages to his automobile. The cause was tried before a jury and the jury returned a verdict in favor of the defendant and against both plaintiffs. Plaintiffs

filed post-trial motion which was denied, and both plaintiffs appeal to this court. No questions are raised on the pleadings.

The collision occurred at a time of the day when both automobiles had their lights on. The intersection was an open intersection without stop signs. Elm Street, a brick paved street, runs east and west and Ida Street, an oil surfaced street, runs north and south. As the two cars approached the intersection, the Steele automobile was to the right of the Bennett automobile. Mrs. Steele testified she had stopped for a hole in the street some four car lengths from Ida Street, and had put her car in second gear and was doing about 20 miles per hour when she saw the Bennett car approaching at a high rate of speed from the left. She testified she stopped and the Bennett car struck her left front fender and swung her car around into the side of the Bennett car. A police officer testified that he found skid marks and that it appeared to him that the Steele car had been spun completely around; that the Steele car looked as though it had been "hooked into." A witness, Roy Burbank, who lived at the northwest corner of the intersection testified he saw the two cars before the collision. That Bennett was driving about four times as fast as Mrs. Steele. That he looked away just at the moment of impact because he knew there was going to be a collision. That he did not see the Bennett car slacken speed at any time before the collision. He would not estimate the speed of the Bennett car or whether it was over the speed limit.

Bennett at the time was a paratrooper stationed at Fort Campbell, Kentucky. He was on week-end leave enroute to his home and had with him another paratrooper, Sergeant Henry

Calhoun. The Bennet car had entered Ida Street some 300 feet to the south of the intersection and had traveled this 300 feet north to the intersection where the collision occurred. Bernett estimated the speed of his automobile at 25 miles per hour as he approached the intersection and testified he slowed to about 15 miles per hour as he entered the intersection. Calhoun estimated the speed at 10 miles per hour, that there were cars parked on the right and that Bennett slowed his car as he approached the intersection. Both Bennett and Calhoun testified they did not see the Steele automobile until it struck the side of the Bennett automobile. The left front fender of the Steele automobile and the right front side of the Bennett automobile was damaged.

The appeal raises questions on the admission of evidence, rulings by the court on the questioning of jurors, the giving of Defendant's Instruction No. 6 as to right-of-way, and misconduct on the part of defendant counsel.

Plaintiff contends that the trial court erred in denying plaintiffs' motion that the court inquire, or permit plaintiffs' counsel to inquire of the jury as to the interests of the jurors in Country Mutual Insurance Company. The motion was supported by affidavit by both plaintiffs that the Country Mutual Insurance Company was the insurance carrier of Bennett; that the jury would come from various parts of Franklin County, which is rural and farming area, and that it was anticipated that many of the jurors would be interested, financially or otherwise, in the Country Mutual Insurance Company, for the reason that many farms are insured with said insurance company.

Our courts are not in accord on this matter. In Mithen v. Jeffery, 259 Ill. 372, Kavanaugh v. Parret, 379 Ill. 273, and Edwards v. Hill-Thomas Lime Co., 378 Ill. 180, the questioning of jurors as to their interest in an insurance company was held improper. In Iroquois Furnace Co. v. McCrea, 191 Ill. 340, Smithers v. Henriquez, 368 Ill. 588, Wheeler v. Rudek, 397 Ill. 438, and Seyferlich v. Maxwell, 28 Ill. App. 2d 469, our courts have held where the right to examine as to interest in insurance companies is asked for or exercised in good faith by either party it is permissable. In the reasoning of all the cases while the courts endeavor to protect the right of the litigant to have a fair and unbiased jury, at the same time they seek to prevent the insurance issue to be put in the cause, either under the guise of seeking to protect a client's interest, or intentionally. The thread of reasoning in all the cases permitting the questioning of jurors on the insurance matter is the good faith of the person seeking to so question.

And while the action of a trial judge in permitting or refusing such questions is subject to review, in the great majority of such cases, the discretion of the trial court should govern. In some of the cases, the showing for the right to ask such questions was insufficient. Wheeler v. Rudek, 397 Ill. 438. In that case an affidavit was made stating that the affiant had "reasonable grounds for believing" that persons interested in the insurance company might be among the panel called into the jury box. The court held such showing insufficient. In this case the affidavit stated that the jury would come from rural and farming area of the county and it was anticipated that many of

the jurors would be interested in the Country Mutual Insurance Company, for the reason that many farms were insured with this company. Using the reasoning of the Wheeler v. Rudek case, this is insufficient. In that case the affiant stated he had reasonable grounds to believe. Here the affiants stated it was anticipated. Neither stated facts sufficient to conform to the requirement of good faith.

Our courts in permitting the questioning of jurors as to their interest in an insurance company, on the good faith doctrine, have in effect rendered void the previous theory that the question of whether the defendant has or has not insurance, is irrelevant. The case of Wheeler v. Rudek, 397 Ill. 438, has two vigorous dissents, one by Justice Wilson and one by Justice Thompson. In the dissent of Justice Thompson, it seems he stated the trend of judicial thinking on this matter when he said:

> "I am also inclined to believe defendants in such cases are over-sensitive for fear a breath of suspicion may enter the minds of the jury that the defendant is insured. In this day and age it is common knowledge that most, if not all, automobile owners carry insurance and in the trial of cases the defense is usually conducted by the insurer."

The danger presented by this theory is that it is founded on a mistaken premise, namely, that most, if not all automobile owners carry insurance. It is probably true that the majority of automobile owners carry some form of insurance, but not all. And coupled with the known tendency of the average juror or

citizen to regard any insurance company as a moneyed corporation, the injection of insurance into any case might prove disastrous to that individual who, for some reason, was not covered by insurance. Our courts should be cautious in permitting the questioning of jurors as to their interest in or to any insurance company. If it is based upon the fact that one or more insurance companies have a large amount of policy holders in the vicinity, every cause would be subject to the same procedure. The plaintiff could make a motion to question the jurors as to any insurance company, stating that such company had a large number of policy holders in the county and that he anticipated that some of the policyholders would be on the jury panel. If the motion was granted and the jurors questioned, undoubtedly the question of insurance of the defendant would be intimated to the jury. On the basis of the holding in Wheeler v. Rudek, 397 Ill. 438, and for the further reason that we are not inclined to question the discretion of the trial court, this court must hold that the refusal of the trial court to permit plaintiffs to examine the jurors as to their interest in Country Mutual Insurance Company, was correct.

As to the contention of plaintiffs that a juror had stated that he could not hold against the defendant, after he had been accepted by the plaintiffs, and that said juror should have been excused, there is nothing in the record to preserve this point. The brief of the plaintiffs makes certain allegations as to this juror, and the brief of the defendant denies these allegations. In the absence of a record showing the questions and answers, there is nothing for this court

to pass upon. The case of Dille v. Eads, 21 Ill. App. 2d 301, is in point. There a challenge for cause of a juror was asked, after the jury had been sworn to try the issues of the cause. There, as here, counsel disagreed, and there was nothing in the record to show the questions and answers. And the court there held that the reviewing court could not review the action of the trial court in denying the challenge for cause. Citing Reisch v. People for Use of Stringer, 130 Ill. App. 164. In the case of Augustine v. Stotts, 40 Ill. App. 2d 420, the court held that in the absence of any valid record the point raised was not properly preserved for review.

Plaintiffs complain of the giving of Defendant's Instruction No. 6. An examination of this instruction shows that it is incomplete and objectionable, but we do not believe it is such an instruction, when considered with all the other instructions given, that would constitute reversible error. Plaintiffs' Instruction No. 12, IPI No. 60.01 was given and correctly stated the law governing the right-of-way. On the whole, we believe the jury was fully and competently instructed as to the law of the case. At its best or worst, Defendant's Instruction No. 6 was innocuous.

The plaintiffs contend that the Best Evidence Rule was violated in the questioning of the witness Roy Burbank as to prior statements concerning the collision. We see no merit in this contention. The witness testified to material facts concerning the collision. Whether he made oral or written statements concerning the facts in question, it is proper for the defense to ask him on cross examination if he made con-

tradictory statements prior to the trial. Here, no attempt was made to introduce a written statement of the witness, but he was asked if he made certain statements, which he denied. There was no error in permitting the questions. Forslund v. Chicago Transit Authority, 9 Ill. App. 2d 290.

The final point raised by plaintiffs on appeal, is that counsel for defendant committed error in final argument. The argument complained of was (1) Plaintiffs wanted jury to take away from this boy and give to plaintiffs, (2) That defendant was a paratrooper, a member of the Screaming Eagles, and member of the Military Service, and (3) That if defendant was a "Yard Bird" or had a bad reputation, Plaintiffs' counsel would have shown this.

Counsel may not make inflammatory remarks calculated to arouse passion and prejudice of the jury so as to bring about a verdict for his client. The purpose of a summation or argument of counsel is to assist the jury to arrive fairly and impartially at the facts submitted to them for decision, and the widest or greatest latitude consistent with precedents, and reasonable interpretation thereof, and consistent with decorum and a reasonable ambition to succeed by honorable means should be given counsel in his closing arguments. Ill. Law and Practice, Vol. 34, pp. 526. In the case of Walsh v. Chicago Rys Co., 303 Ill. 339, it was held that in arguing cases to the jury attorneys must be allowed to make reasonable comments upon the evidence. The interests of public justice requires that counsel should not be subjected to unreasonable restrictions in this regard.

In questions of this character, the rulings of the trial court must be given considerable weight. The trial court is there and hears the remarks of counsel. He is in a far better position than the reviewing court to judge the effect of such remarks or argument upon the jury. In this case, the evidence showed that both the defendant Bennett and his companion were paratroopers stationed at Fort Campbell, Kentucky. While the name of their outfit is not important, the injection of the name is not such a matter that would tend to influence the jury in arriving at a verdict in the cause. Considering the remarks complained of, we find nothing so inflammatory or prejudicial as to warrant this court in reversal.

The judgment for the defendant and against the plaintiffs will be affirmed.

Affirmed.

Wright, J., Concurs

Dove, P. J., Concurs

PUBLISH ABSTRACT ONLY

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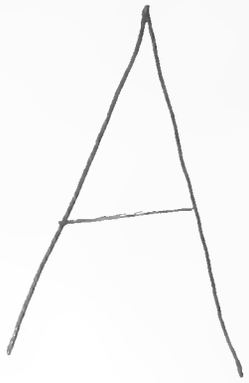

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(50 I.A.2d 88)

ARTHUR G. ANDERSEN,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	
v.	)	CIRCUIT COURT OF
	)	
ROBERT SKIBA and ED VREE, d/b/a VREE'S GROCERY STORE,	)	COOK COUNTY.
	)	
Defendants-Appellants.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $10,000 entered on a verdict in favor of the plaintiff in a personal injury action growing out of a collision between two automobiles at the intersection of 111th Street and Sawyer Avenue in Chicago. The principal issue involves the duty of a motorist approaching a street protected by stop signs.

The accident occurred at about 1:00 P.M. on July 21, 1961. Plaintiff, a man 68 or 69 years old, was driving a car north on Sawyer Avenue. As he approached 111th Street, he stopped at the stop sign protecting the intersection. It was raining and drizzling. Eastbound traffic on 111th Street, a two lane street, was heavy. A short block east of Sawyer Avenue there is a stop light at the intersection of Kedzie Avenue and 111th Street. When that light is against the eastbound traffic, there is often an accumulation of cars on 111th Street backed up to and blocking the Sawyer Avenue intersection. That was the situation when the plaintiff stopped at the stop sign.

After he had waited for three light changes of the Kedzie Avenue light without moving, the driver of one of the eastbound stopped cars backed up, and plaintiff who had drawn

up to the curb took the opportunity and pulled through the opening. When he reached a point where he could see the westbound traffic, he looked in that direction. He says he looked over the tops of the eastbound cars and could see no tops of cars coming west, so he started across slowly. As he did so, a car driven by defendant Robert Skiba, a delivery boy employed by defendant Ed Vree, was approaching the Sawyer Avenue intersection from the east. Plaintiff testified that Skiba was driving about 30 to 40 miles an hour; that he saw three people in the front seat—the driver and two girls. He says "they were all three laughing and one girl, she just threw her hand up over her face like that and the driver made a quick motion and he started sliding...." It appeared to the plaintiff that the driver was looking at the girls. Skiba, on the other hand, testified he was going 20 to 25 miles an hour and that he was alone in the car.

Plaintiff stepped on the gas, his wheels started spinning, apparently because of the wet pavement, and Skiba skidded into him. At that time the plaintiff was going about three miles an hour, and his front bumper was just about at the north curb lane of 111th Street. He was struck so hard, his car spun around and he was knocked unconscious for a few seconds. When he came to, his car was facing southeast, with the rear bumper a little to the north of the curb lane of 111th Street.

Defendants argue that the evidence established as a matter of law that plaintiff was not in the exercise of ordinary care at and prior to the time of the accident. The principal case on the question of the duty of a motorist

approaching and crossing a street under the circumstances that obtained here is Pennington v. McLean, 16 Ill. 2d 577, 158 N.E.2d 624. The Supreme Court there reversed and remanded a judgment of the Appellate Court, which had held that plaintiff's intestate was guilty of contributory negligence in entering a preferential four-lane highway and proceeding into the defendant's lane, and had reversed without remanding a judgment in favor of the plaintiff. In its opinion reversing the Appellate Court, the Supreme Court discussed a provision of the Illinois statutes relating to stopping at preferential highways, saying, at p. 583:

> "That provision has been construed as neither imposing an absolute liability upon the party approaching from the nonpreferential highway, nor conferring an absolute right of way regardless of all circumstances on the party traveling on the preferential highway. (Anderson v. Middleton, 350 Ill. App. 59; Wallace v. Parnell, 306 Ill. App. 310.) Thus, a person approaching a preferred highway is not required to stop, either at the stop sign or at the intersection line, long enough to permit any car that he observes on the highway to pass, regardless of its distance from the intersection. (Little v. Gogotz, 324 Ill. App. 516; Leech v. Newell, 323 Ill. App. 510.) The statute requires only that the motorist confronted by a stop sign, may, exercising reasonable care, proceed across the intersection after he has stopped and yielded the right of way to such vehicles on the through highway as constitute an 'immediate hazard.' 164 A.L.R. 24, 25; Little v. Gogotz, 324 Ill. App. 516; DeLegge v. Karlsen, 17 Ill. App. 2d 69.
>
> "The Illinois decisions, however, do not provide a precise formula for determining whether a particular vehicle has conformed to set standards; that question must be determined by the jury (DeLegge v. Karlsen, 17 Ill. App. 2d 69; 164 A.L.R. 24, 25), and involves considerations as to relative speeds and distances of the vehicles from the intersection. Middendorf v. Loiseau, 335 Ill. App. 338; Kirchoff v. Van Scoy, 301 Ill. App. 366."

It was for the jury to determine whether conditions existing at

111th Street and Sawyer Avenue constituted an "immediate hazard" to plaintiff. Plaintiff under the law was not required to wait until all traffic had dispersed, and when one eastbound driver courteously let him through, we cannot say he was negligent in law in taking advantage of that courtesy.

Defendants argue that when plaintiff came into the westbound lane and saw defendants' car, instead of stopping his vehicle, he depressed the accelerator in a vain attempt to beat the oncoming car across the intersection, and that more imprudent conduct could not be imagined. But plaintiff testified that when he saw defendants' car, he also saw that there were two girls in it beside the driver and that the driver was looking at the girls and not at the road, and from this the plaintiff could have reasonably concluded that if he stayed where he was, he surely would have been hit and that if he tried to accelerate across, there was a chance he could avert an accident. The jury could reasonably have drawn this inference from the evidence presented to it.

Defendants allege that certain errors were committed during the course of the trial. A series of questions involving Skiba's knowledge of the rules of the road and his observation of the stopped eastbound traffic at the intersection were put to him by plaintiff's attorney under the provisions of Section 60 of the Civil Practice Act. These were objected to, and the objections for the most part were sustained. We agree with the trial judge in his comment that there was no reasonable possibility that the jury had been prejudiced by the mere posing of the questions.

Plaintiff's attorney examined Skiba under Section 60 of the Civil Practice Act as to whether he remembered that one Frank Bila had witnessed the accident and whether he had talked to the latter about it. The court permitted this questioning upon the assurance of plaintiff's counsel that it would be connected up at a later time. Plaintiff's attorney subsequently cross-examined both Skiba and Vree with respect to their knowledge of Bila. He was not produced either by the plaintiff or the defendants, and defendants argue the jury could draw the prejudicial inference that he had information with which to impeach Skiba. Plaintiff's attorney's explanation is that he examined Skiba and Vree concerning Bila on the assumption the defendants would call him as a witness, and that he was unaware that the defendants had not been able to get in touch with him. While the examination of both defendants regarding Bila was an impropriety, we do not consider it reversible error. Furthermore, defendants failed to move to strike the testimony concerning Bila when it became apparent the evidence would not be connected up. Landrey v. Rosen, 255 Ill. App. 21; Isenhart v. Seibert, 6 Ill. App. 2d 220, 127 N.E.2d 469.

Defendants also argue that they were prejudiced by the direct examination of plaintiff, as follows: "Q. Where was your home then, so we understand? A. 11212 Sawyer, South Sawyer, and I was going to go to 72nd and Green. My wife used to bake bread and sell a few loaves." Defendants argue this was an obvious attempt to evoke the jury's sympathy by pointing up the plaintiff's alleged impecunious condition, and that the

attempt was aggravated by calling his wife to the stand and having her testify as to his activities in delivering bread she baked. Such matters are difficult to conceal at a trial. Defendants cite Jones & Adams Co. v. George, 227 Ill. 64, 81 N.E. 4; Frick v. Aurora, Elgin & C. Ry. Co., 154 Ill. App. 277; and Felau v. Lake Sand Co., 210 Ill. App. 244, to support their position, but in the first two cases cited the court held it was improper for the plaintiff in a personal injury case to testify to his married status and the number of children in his family because of the sympathetic effect it would have in the jury, and in the Felau case, the court said it was improper in a personal injury case for the plaintiff's attending physician to testify as to the plaintiff's impecunious condition and to state that the plaintiff had always been his pensioner and had never paid him a medical bill. We do not consider the admission of the evidence objected to in the instant case reversible error.

Defendants argue it is clear that the manifest weight of the evidence fails to support the jury's finding, since there was a conflict between the testimony of the plaintiff's medical experts and those of the defendants. This conflict goes only to the question of damages, however, and as the point of excessiveness of damages is not included in the Points and Authorities nor argued in the brief, we cannot consider it on appeal. Illinois Appellate Court Rules, Rule 5(k) (1964); Illinois Revised Statutes, Ch. 110, § 101.39 (1963). The conflict in the evidence is over the interpretation of X-rays taken of plaintiff immediately after the accident and relates to the defendants' contention that an intervertebral lumbar

fracture which appears in the X-rays occurred prior to the accident. This conflict presents an issue as to the credibility of the respective medical witnesses, and the jury's resolution of that issue is not ground for reversal since there was evidence to support the plaintiff's theory.

Judgment affirmed.

Dempsey and Sullivan, JJ., concur.

(88)

50 I.A.2 88

49390

RINN-SCOTT LUMBER COMPANY, an Illinois corporation,

Plaintiff-Appellant,

v.

RAYMOND W. JACOB, a/k/a R.W. Jacob, doing business as WHOLESALE LUMBER SALES,

Defendant-Appellee.

APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action to recover for goods sold and delivered. Defendant filed a general appearance and jury demand. He also answered denying the allegations of the statement of claim. The case came on for trial in the Municipal Court of Chicago on October 3, 1962, and, defendant failing to appear, a default judgment in the amount of $3,527.56 was entered against him.

The sole question presented to this court is whether the trial court was justified in vacating the judgment upon petition and amended petition of defendant filed more than thirty days after the entry of the default judgment.

Subsequent to the entry of judgment several garnishment summons were issued to various garnishees, and on January 31, 1963 a judgment was entered against Northwest National Bank, garnishee, in the sum of $518.89, which was satisfied on February 11, 1963. On February 27, 1963 an affidavit for garnishment of wages, salary, etc., together with accompanying interrogatories directed to the defendant and General Plywood Corporation, as garnishee, were filed with the clerk of the municipal court. Thereafter, on March 26, 1963, General Plywood Corporation filed its answer showing that it was holding

$796.59 of defendant's wages. On March 20, 1963, prior to the filing of the answer by the garnishee, General Plywood Corporation, the defendant herein filed a petition praying for an order vacating the default judgment entered against him on October 3, 1962. The petition alleged that prior to entry of the default judgment, a conference was had in the office of plaintiff's attorney during the course of which original invoices, received from plaintiff, were exhibited to said attorney; that said invoices showed that the sales upon which the present litigation was based were made to Wholesale Lumber Sales, then an Illinois corporation, and that the purported copies of these invoices, constituting the exhibits attached to plaintiff's statement of claim, had been doctored by inserting the words, "R. W. Jacob D/B/A" before "Wholesale Lumber Sales"; that the plaintiff's attorney agreed to amend the proceeding to conform to these facts; that defendant relied upon this agreement and neglected to attend upon the trial date; that judgment was entered against the defendant, and that a fraud had been perpetrated upon the court. On the same day plaintiff filed its answer to the petition alleging that the time for filing the petition had expired; that the petitioner's version of the conference with plaintiff's lawyer was not true; that there was a conference but that it occurred at the time scheduled for the taking of defendant's deposition; that at this conference defendant's attorney represented that this was not a personal obligation of the defendant, and that he would make arrangements for a settlement by the corporation; that, as a result of this representation, defendant's deposition

was never taken; that thereafter on many occasions the attorney for the defendant was contacted, and he either refused to talk to plaintiff's attorney, or he promised to contact the plaintiff's office with a view to working out a settlement, which he neglected to do; that notice was given by mail to defendant informing him of the default judgment; that the invoices attached to plaintiff's complaint were never altered; that plaintiff never knew of any corporate entity until after checks, given by the defendant, were returned because of insufficient funds; that plaintiff had always extended credit to Ray Jacob, personally, and that no fraud had been perpetrated upon the court.

Defendant filed an amended petition bearing date April 5, 1963, by leave of court setting forth the same allegations made in the original petition, and in addition describing the documents allegedly presented to plaintiff's counsel at a conference had prior to trial and stating that these documents were attached to the amended petition as exhibits one to twenty-four. (The record on appeal shows no such exhibits attached to the amended petition.) In addition, the amended petition states that in January, 1963, when a garnishment summons was served upon petitioner's bank, plaintiff's attorney was contacted and the alleged fraud was again pointed out, and numerous attempts were made to arrange a conference to arrive at a true disposition of the matter, but such attempts were to no avail, and the bank satisfied the judgment in garnishment. On April 17, 1963, plaintiff filed an answer to the amended petition setting up the same matters appearing in its original answer, and, in

addition, admitting that, after the service of garnishment summons on Northwest National Bank, plaintiff's attorney was contacted by defendant's attorney and the matter was discussed, but that no action was taken by the defendant to prevent the prosecution of supplemental proceedings until after approximately $575.00 had been recovered by the plaintiff on the garnishment judgment. The answer also stated that the notice of the default which was given to the defendant was sent in accordance with instructions of the trial judge.

On June 14, 1963, pursuant to defendant's amended petition, the trial court vacated the default judgment and set the cause for trial on October 10, 1963. From this order plaintiff appeals.

Since the petition to vacate the judgment was filed after term time, the court had no jurisdiction to grant the relief prayed for unless, by his petition, the defendant has brought himself within the purview of Section 72 of Rule 1 of the Municipal Court of Chicago.

This case was brought in the Municipal Court of Chicago and the rules of that court govern the procedure. Section 72 of Rule 1 of the Municipal Court of Chicago governs relief from final orders and judgments after thirty days from the entry thereof. This section is practically identical with section 72 of the Civil Practice Act (chap. 110, sec. 72, Ill. Rev. Stat., 1963). It has been held that the interpretation of section 72 of the Civil Practice Act is equally applicable to Section 72 of Rule 1 of the Municipal Court of Chicago. Boyle v. Veterans Hauling Line, 29 Ill. App. 2d 235.

In Lusk v. Bluhm, 321 Ill. App. 349, 355, the court in

discussing motions to vacate defaults after term time stated, "The party seeking to have a default set aside must show that he acted with due diligence to protect his rights and that he has a meritorious defense. (Nitsche v. City of Chicago, 280 Ill. 268.)" The following rule is set forth in Illinois Law and Practice: "A judgment by default ordinarily will not be opened or set aside unless the party seeking such relief shows that he acted with due diligence to protect his rights." (23 I.L.P., Judgments, sec. 213.)

Defendant's petition fails to allege any facts upon which the trial court could have based a finding of the required diligence, In Till v. Kara, 22 Ill. App. 2d 502, 509, the court said, "Thus, it is well settled by the decisions in this state that not only must the defendant in such a case show a meritorious defense but that in addition his affidavits must show due diligence. Nitsche v. Chicago, 280 Ill. 268; Citizens' Sav. Bank & Trust Co. v. Chicago, 215 Ill. 174. A showing of a meritorious defense alone is not sufficient. Barrett v. Queen City Cycle Co., 179 Ill. 68."

Although he had notice of the pending litigation and had filed his answer thereto, defendant failed to appear on the date set for trial, and a default judgment was entered against him. Notice of the default was sent to the defendant in accordance with instructions of the trial judge, but no action was taken thereon. Garnishment summons were issued to various garnishee defendants, but no action was taken by the defendant to stay the prosecution of these supplemental proceed-

ings until after recovery was had from garnishee, Northwest National Bank, and defendant's salary had been held up by his employer pursuant to a garnishment of wages. Defendant in his amended petition admits that he had notice of the garnishment proceeding against Northwest National Bank in January, 1963, and he does not deny receipt of a letter from plaintiff's attorney regarding the entry of the original judgment on October 3, 1962. Despite this knowledge, defendant chose to wait until March 20, 1963 to file his petition to vacate.

The rule is well established in this state that motions to set aside default judgments are addressed to the sound discretion of the court and will not be reversed except where such discretion has been abused. (Nitsche v. City of Chicago, 280 Ill. 268.) Where a petition to vacate a judgment is filed more than thirty days after the entry of the judgment, and fails to state facts tending to establish the exercise of diligence, there is nothing upon which the trial court may exercise its discretion.

Since the petition and amended petition in the case at bar fail to allege or show diligence on the part of the defendant in allowing a default to be entered against him, and in failing to take timely action to have such default set aside, it is unnecessary for us to consider the question as to whether the defendant had a meritorious defense.

The order of the trial court vacating the judgment in favor of the plaintiff is reversed and the cause is remanded to the trial court with directions to re-enter the judgment.

Order reversed and cause remanded with directions.

Schwartz, P.J., and Dempsey, J., concur.

(100)

A

49330

(30 I.A.2 100)

FRANKLIN PARKS,	)	
	)	
Plaintiff-Appellant,	)	APPEAL FROM THE
	)	
v.	)	SUPERIOR COURT
	)	
CITY OF CHICAGO a municipal corporation,	)	OF COOK COUNTY.
	)	
Defendant-Appellee.	)	

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action for personal injuries alleged to have been sustained by the plaintiff when he fell while walking, as a result of a defective portion of a sidewalk. The case was reached for trial on May 1, 1963, and was dismissed for want of prosecution. On that day plaintiff's attorney appeared before the assignment judge and presented to the court an affidavit wherein the attorney stated that he last spoke to his client on February 28, 1962, (about fourteen months prior to May 1, 1963), in the attorney's office. That prior to the cause coming on the call below the black line efforts were made to communicate with the plaintiff. That the attorney had written to the former addresses at which the plaintiff had resided and communicated with friends who were attempting to locate the plaintiff. Plaintiff's attorney requested that the case be placed on the dormant call.

For the purpose of clarification, when a case gets above the so-called black line of the assignment call, the case must be ready for trial and will be sent out to a trial judge when the case is called.

The court, upon presentation of the affidavit, entered an order dismissing the case for want of prosecution. There-

after, on May 29, 1963, a petition was filed by the plaintiff, Franklin Parks, in which he stated that he had failed to notify his attorneys of his present address, and for that reason the attorneys were unable to inform him as to the date of trial. He further alleged that he sustained a fracture as a result of his accident, and prayed for an order vacating the order of May 1, 1963 dismissing the case and that the case be reinstated and set for immediate trial. This petition was denied on May 31, 1963.

The sole question presented to this court is whether the order of May 1, 1963, dismissing the case for want of prosecution and the order of May 31, 1963, denying the petition to vacate the order of May 1, 1963, and refusing to reinstate the cause, amounted to an abuse of discretion by the trial court.

The affidavit of the attorney for the plaintiff, which was presented on the date that the case was called for trial, fails to state that the attorney did not know of the plaintiff's whereabouts, or that the attorney's efforts to communicate with the plaintiff were unsuccessful, or that the plaintiff had any reason for not being in court.

Paragraph (6) of Supreme Court Rule 14 (Ill. Rev. Stat., 1963, chap. 110, sec. 101.14(6)), reads as follows: "No motion for the continuance of a cause made after the cause has been reached for trial shall be heard, unless a sufficient excuse is shown for the delay."

Plaintiff has cited the following cases in support of his statement that the purpose of courts and of the law is to

accomplish justice and to give every litigant an opportunity to present his case: Yott v. Yott, 257 Ill. 419; Epley v. Epley, 328 Ill. 582; Wainwright v. McDonough, 290 Ill. App. 50, and Athens v. Ernst, 342 Ill. App. 357.

The Yott case involved a bill to contest a will, which bill had been dismissed for want of prosecution. The facts showed that the case was not at issue at the time the bill was dismissed, and the upper court further took into consideration that the time for contesting the will had expired.

The Epley case also involved a bill to contest a will, which bill had been dismissed for want of prosecution. The cause was not at issue at the time of dismissal. There, again, the time for filing the bill to contest the will had expired.

The Wainwright case involved a bill of complaint which had been dismissed. The facts showed that while the attorney for the plaintiff wrote his client that he was withdrawing he did not withdraw by leave of court, and he failed to appear in court. The letter was addressed to the plaintiff's mother's home while the plaintiff was located in Washington, D.C., and the plaintiff did not receive the letter until after the case had been dismissed.

The upper court reinstated the suits in the foregoing three cases.

In the Athens case, some six years after the complaint had been filed and about seven months after a general appearance had been filed for the defendant, which had been withdrawn by leave of court and a special appearance substituted therefor, the suit was dismissed for the failure of the plaintiff to show reasonable diligence to obtain service through the issuance

of alias writs. The court in that case reversed the order dismissing the suit, but based its decision upon stipulations and conversations had between the attorneys for the respective parties while the case was pending. The Athens case bears no similarity to the case at bar.

The plaintiff also cites the following cases in support of his contention that it is well established in Illinois that the courts are liberal in setting aside defaults within term time: Mason v. McNamara, 57 Ill. 274; McMurray v. Peabody Coal Co., 281 Ill. 218; Busser v. Noble, 8 Ill. App. 2d 268; Dalton v. Alexander, 10 Ill. App. 2d 273, and Dann v. Gumbiner, 29 Ill. App. 2d 374.

Each of the foregoing cases was decided upon the particular facts of the case, and in each of these cases a default judgment had been entered against the defendant. In each of the foregoing cases the facts showed that the default was occasioned by the act of some other party over whom the defendant had no control.

In Busser, Dalton and Dann the court reversed because it felt that a party who reported a suit and summons to his insurance company, and received assurance from the insurance company, or its agents, that his interests were being protected, showed a sufficient excuse to have a default judgment against the defendant vacated, because of the insurance company's failure to appear in the cases at the proper time.

The facts in the Mason and McMurray cases bear no resemblance to the facts in the case before us.

The plaintiff also cites the case of Wright v. Chicago Transit Authority, 43 Ill. App. 2d 408, which is reported only in abstract form. However, in that case the court said, "We do not deem it necessary to discuss the case at length as the defendant has failed to file a brief as required by Rule 7 of this court."

The plaintiff contends the law favors a trial on the merits. With this statement we agree. The action of the assignment judge in dismissing this case does not necessarily deprive the plaintiff of a trial on the merits. In an action such as the one before us, plaintiff under Section 24 of the Limitations Act (chap. 83, sec. 24(a), Ill. Rev. Stat., 1963) may commence a new action within one year after he has been nonsuited when the time limited for bringing such action shall have expired during the pendency of the suit.

In the case of Nordstrom v. City of Chicago, 119 Ill. App. 465, 466, the court said, "The suit was dismissed at plaintiff's costs upon regular call, and it was discretionary with the trial court whether to reinstate or not."

Again, in the case of Stewart v. Chicago & Alton Railroad Co., 207 Ill. App. 549, the court said on page 552, "When the court so exercises its discretion in the matter, its action will not be interfered with by a reviewing court, unless there has been a clear abuse of its discretion."

The court in Goodwillie v. Schaub, 93 Ill. App. 311, in sustaining a dismissal for want of prosecution and denial of a motion within term time to set aside the dismissal, said on page 312:

> "The motion in question was addressed to the sound lega (sic) discretion of the court 'Ordinarily the Appellate Court will not review its exercise, but only do so in furtherance of justice, when that discretion has been wrongfully and oppressively exercised.' Waugh v. Suter, 3 Ill. App. 271, 274. Or unless that discretion has been abused and injustice done. Andrews v. Campbell, 94 Ill. 577; Pitzele v. Latkins, 85 Ill. App. 662.
>
> "Upon a careful examination of the record, including the affidavits filed upon the hearing of the motion to vacate, we can not say that there has been an abuse of discretion by the trial court in overruling said motion."

The plaintiff in his petition to vacate was required to show to the court a sufficient excuse for his failure to be in court when the case was called for trial. His so-called excuse is that he failed to notify his attorneys of his present address. His petition is based upon his own negligence. From his sworn petition it will be noted that his attorneys were not at fault but that he, alone, through his failure to notify his attorneys, did not know that the case would be on the trial call for May 1, 1963. The plaintiff did not go so far as to say that he had ever moved, or that his present address was different from a previous address he may have had at any time during the pendency of the case.

Litigants and their attorneys owe a duty to the court to be ready to proceed with trials in their cases when reached on the trial calendar. That is particularly true today with the great number of pending cases and because of the efforts being made, both by the assignment judge and the trial judges, to cut down the backlog of pending cases. If the plaintiff's attorney in this case was unable to locate his client

prior to trial, it became his duty to apprise the court of that fact immediately instead of waiting until the day the case was set for trial.

If the plaintiff could rely on his affidavit and the affidavit of his attorney in this case, he would be entitled to a vacation of a dismissal order merely because of his failure to appear in court, or by staying away from court on the day the case was called.

We are of the opinion that the assignment judge did not abuse his discretion when he entered the dismissal order, or when he refused thereafter to vacate said order.

Order affirmed.

Schwartz, P.J., and Dempsey, J., concur.

Abstract only.

49169 (108)

50 I.A.2 108

THEODORE D. ANTHONY,

Plaintiff-Appellee,

vs.

YELLOW CAB COMPANY,

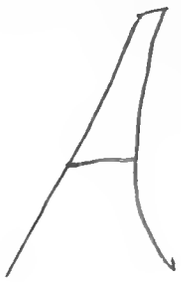
a corporation,

Defendant-Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY



MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Theodore D. Anthony brought an action in the Circuit Court of Cook County against the Yellow Cab Company to recover for personal injuries sustained by the plaintiff in an occurrence which took place on September 2, 1960, at the intersection of LaSalle Street and North Avenue in Chicago, Illinois. The plaintiff, a pedestrian, was walking in an easterly direction across LaSalle Street and was struck by a Yellow Cab and injured. The plaintiff had a jury trial and the jury returned a verdict in favor of the plaintiff in the sum of $10,000.00. Judgment was entered on the verdict and the court denied the post-trial motions of the defendant for judgment notwithstanding the verdict or, in the alternative, for a new trial.

The defendant's theory is that the plaintiff was guilty of contributory negligence; that the defendant was not guilty; and that the verdict and judgment were contrary to the manifest weight of the evidence. No question is raised as to instructions.

LaSalle Street is a north and southbound street, 80 feet wide from curb to curb. There are three lanes of traffic for southbound vehicles and three lanes for northbound vehicles. In the center of this street there are stop-and-go lights placed on small concrete abutments. These lights face only north and south. The abutment on the south side of North Avenue begins at the south end of the crosswalk. Both the crosswalk and the traffic lanes are marked. In addition to the usual red, green and yellow lights,

there is a green arrow for left turns. There are traffic-control lights on all four corners of the intersection which face in all four directions.

The plaintiff had posted a letter in the mailbox located south of the southwest corner of LaSalle Street and North Avenue, and he started to cross LaSalle Street, going east. At approximately the center of the street he was struck by a taxicab driven by an employee of the defendant.

Section 129 of Chapter 95-1/2 of the Uniform Traffic Act provides that where the traffic is controlled by traffic-control signals, when the signal is green, vehicles facing the signal may proceed, but the right-of-way shall be yielded to other vehicles or pedestrians within the intersection at the time such signal is exhibited, and the pedestrians facing the signal may proceed across the roadway within any marked or unmarked crosswalk.

There was a serious conflict in the evidence as to whether or not the plaintiff was crossing with the green light in his favor. The plaintiff had testified that he mailed a letter in the mailbox on the corner, waited for the light to change in his favor, and then stepped off the curb to cross the street. He further testified that he was accustomed to cross that intersection very often and that from the time he started to cross LaSalle Street he saw no automobiles going north or south on LaSalle Street, and he did not see the cab which struck him. He also testified that he was within the lines which marked out the pedestrian crosswalk on the south side of the intersection.

All the other witnesses were in substantial agreement that plaintiff was crossing in the crosswalk. Bland, the cab driver, stated that the plaintiff was on the southernmost line of the crosswalk. Grace Rauworth, who had been subpoenaed by the defendant, testified as the court's witness, apparently because she was reluctant to testify at all. She stated that the plaintiff was

proceeding in the crosswalk. Hyman Weisbrodt and Alvin Lemley, both employees of the defendant, gave somewhat ambiguous testimony that the plaintiff was crossing out of the crosswalk, walking a line parallel to, but about 5 feet to the south of the southernmost line of the crosswalk. Weisbrodt testified that after the cab struck the plaintiff it came to a stop with its front bumper still within the crosswalk. Lemley testified that the front of the cab was two or three feet south of the crosswalk line. Renner, a witness for the plaintiff, testified that the plaintiff was in the middle of the crosswalk when he was hit.

The other question before the jury is as to whether the plaintiff crossed the street with a red light against him. Bland, Lemley and Rauworth all testified that the plaintiff was crossing against the traffic light. Weisbrodt, one of the defendant's witnesses, testified that the plaintiff had started to cross the street just a second before the light went red. The plaintiff and Renner testified that the plaintiff was crossing with the light. The defendant introduced prior inconsistent statements appearing in a statement signed by Renner and given to a Yellow Cab Company investigator. Renner denied that he had read the statement before signing it and testified that he had not made the inconsistent statements to the investigator. The investigator took the stand and contradicted Renner's testimony, and the statement was received in evidence. The credibility of all the witnesses was a matter to be passed on by the jury.

Winfield Bland, the driver of the taxicab, testified that he was driving his cab south on LaSalle Street and that about 200 feet north of the intersection of North Avenue he had decreased his speed to 15 miles an hour; that there was no southbound traffic in the lane in front of his cab, but there was traffic in the next lane west of that in which his cab was proceeding. He stated that the car next to him was in the lane to his right and moving at

about the same speed as his cab. Bland further testified that he first saw the plaintiff when he stepped into the path of the taxicab from in front of a car to Bland's right in the center lane. Bland stated that he veered the direction of his cab; the other car kept going on and the left front fender of the cab struck the plaintiff, throwing him about 6 feet through the air.

Weisbrodt, a witness for the defendant, who had been a driver for the Yellow Cab Company for the last ten years, testified that at the time of the accident he had gone to mail a letter in the box on the southwest corner; that he saw the plaintiff start across the street, and that he was just missed by a car in the second lane and was hit by the Yellow Cab in the third lane. Lemley, another witness for the defendant, and a Yellow Cab driver, testified that at the time and place in question he was driving south on LaSalle Street in the middle lane of traffic. The taxicab which was involved in the accident was about 30 to 45 feet ahead of him and in the lane to his right. He also testified that he was proceeding on a green light; that he saw the plaintiff walk from the curb in front of a car and right into the taxicab. The testimony of Weisbrodt was in accord with that of the taxicab driver with reference to the other car missing the plaintiff and the cab hitting him. This testimony was also in accord with that of Lemley. Rauworth, the court's witness, testified that the taxicab was traveling south on LaSalle Street at 30 miles per hour, and that there was no other vehicle immediately to the right or front of the cab, nor did another Yellow Cab follow, as was testified by Lemley, who stated that he was driving the second Yellow Cab.

Renner, the ambulance driver, testified that the Yellow Cab in question was traveling west on North Avenue and made a left-hand turn to go south on LaSalle Street, and that after it had passed around the concrete abutment it struck the plaintiff; that

the impact took place on the inside southbound lane; that the plaintiff was approximately in the middle of the pedestrian crosswalk at the time; and that the traffic-control lights remained red for traffic on LaSalle Street. In Renner's statement heretofore referred to, and which was introduced into evidence, there was a statement that at the time of the accident the cab was traveling south on LaSalle Street; that the plaintiff was not in the crosswalk and was not crossing with the light.

The plaintiff was 77 years old and in good health. The condition of his eyes was fairly good. There was some testimony by a doctor, on behalf of the defendant, that the plaintiff at the time of the accident had no vision in his left eye and could not recognize red or green colors at a distance of 80 feet. Another physician testified that he had examined the plaintiff about 8 months after the accident and found that the plaintiff could recognize colors and that at the date of the accident he could distinguish colors on a traffic-control signal located 80 feet from him. The plaintiff testified that he was walking with the green light across the street and between the lines marking off the pedestrian crosswalk. He saw no cars in motion from either side and he did not hear horns blowing or the screeching of brakes.

We will first consider defendant's contention that plaintiff was guilty of contributory negligence as a matter of law. In Mahan v. Richardson, 284 Ill. App. 493, a pedestrian at a light-controlled intersection was injured. The court, in reversing a directed verdict for defendants, said at page 504: "In any event, it was for the jury to determine whether plaintiff, under all the circumstances, exercised ordinary care for his own safety."

In Moran v. Gatz, 390 Ill. 478, the Supreme Court reversed a judgment of the Appellate Court which found that the plaintiff

was guilty of contributory negligence as a matter of law. * In that case the court said:

> ". . . it has long been the rule in this State that the driver of a vehicle on a city street is charged with a duty to exercise reasonable care in the operation of his vehicle and to have his vehicle under such control as will enable him to avoid collision with other vehicles or pedestrians. He is charged with notice that pedestrians may cross the street over which he is driving, and other vehicles may be traveling over a cross street. (Harrison v. Bingheim, 350 Ill. 269.) . . ."

The court then discusses the question as to what the rule should be with reference to negligence on the plaintiff's part which contributed to the injury and it cites many cases with approval. Among others, Adler v. Martin, 179 Ala. 97, 59 So. 597, is cited where it was held that the question of whether a pedestrian is guilty of negligence for failing to look up and down a street for approaching vehicles, is a question for the jury on the particular facts of each case. Also cited is Skovronski v. Genovese, 124 Conn. 482, 200 Atl. 575, where the court held that the fact that the plaintiff, having looked at the time she started to cross the street, was not guilty of contributory negligence because she failed to look again. The court, in the Moran case, held that the question was one of fact for the jury to determine, and it further says:

> ". . . Each case must be determined from its particular facts. The question of contributory negligence is one which is pre-eminently for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the failure of the plaintiff to look again was so palpably contrary to the conduct of a reasonably prudent person as to show contributory negligence, the issue is one for the jury. (Blumb v. Getz, 366 Ill.273.)

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* In that case the pedestrian, while walking in a crosswalk, was struck by an automobile at an intersection where there were no traffic signals. However, in Petersen v. General Rug & Carpet Cleaners, Inc., 333 Ill. App. 47, discussed later on, the court held that the principles of the Moran case could be applied where the crossing was controlled by traffic lights.

> Whether failure to look was shown and constituted, in this case, want of due care, was an issue of fact for the jury. Morrison v. Flowers, 308 Ill. 189.
>
> "The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout, or to look again after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law but it is a question for a jury whether he was in the exercise of ordinary care for his own safety. (Citing cases.)"

We find that the question of contributory negligence in this case was a question for the determination of the jury. See also Reese v. Buhle, 16 Ill. App.2d 13, 147 N.E.2d 431; Vasic v. Chicago Transit Authority, 33 Ill. App.2d 11; Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74.

The next point urged by defendant is that defendant was not guilty of any negligence that proximately caused plaintiff's injury.

Forrestal, a police officer, who arrived at the scene about one-half hour after the occurrence and investigated the accident, testified that he had talked to Bland, the cab driver, and Bland had said he first noticed the man when he was about 50 feet away. Bland told the police officer that the plaintiff was walking within the crosswalk and that he, Bland, had the green light, and that at the time he was driving south; that when he saw the pedestrian he applied his brakes and skidded for 15 to 18 feet. Bland, on the other hand, testified in court that the first time he saw the plaintiff was when he stepped in front of his cab, and that he then applied his brakes and blew the horn, and that the car skidded. He stated that the plaintiff at that time was 12 or 13 feet ahead of the cab. Bland denied that he told the police officer, Forrestal, that he saw the pedestrian for a distance of 50 feet.

The jury had a right to take into consideration the fact that, besides the driver of the cab, two of the witnesses who testified in favor of the defendant were employees of the defendant; and they had a right, of course, to consider that Rauworth testified that

there were no cars obscuring the view of the driver of the cab at or before the time of the accident.

The jury also could properly consider the contradictory testimony of defendant's witnesses. Bland, the driver of the cab, testified that he was driving in the inside lane, third from the sidewalk, and that there was another car in the center lane in front of him from which the pedestrian stepped into the path of his cab. Lemley, the driver of another of defendant's cabs, testified that he was driving south in the middle lane of the three lanes of traffic, and that the cab involved in the accident was in front of him and to his left. On direct examination Lemley testified that he saw the plaintiff walking from the southeast corner of North Avenue, coming from a mailbox on that corner, and that he saw the plaintiff step from the curb between the mailbox and the post on the southeast corner of North Avenue and LaSalle Street, and that the mailbox is 6 to 10 feet south of the crosswalk. Pictures of the intersection were introduced and they do not bear out his testimony with reference to the position of the mailbox. Lemley also testified that there were no vehicles going south in the lane to his right. On cross-examination he stated that the mailbox was on the southwest corner of North and LaSalle. He also testified that at the time when he first saw the plaintiff he was stepping from the curb and stepped in front of the car in front of the witness, and that at that time the cab involved in the accident was about 25 or 30 feet in front of him and just north of the intersection. He testified that the involved cab sounded its horn and put on brakes. The plaintiff denies that he heard any horn. Forrestal, the police officer, testified that Bland had told him that he was driving at approximately 27 miles an hour, which speed was reduced to 7 miles an hour at the time of the impact.

In considering the evidence, the jury had a right to take into

consideration the facts surrounding the alleged contradictory statements made by Renner to an investigator for the defendant and to decide whether they believed Renner or the investigator.

The jury could have found from the evidence that the plaintiff had started to cross the street on a green light which changed before the time of the accident. In Petersen v. General Rug & Carpet Cleaners, Inc., 333 Ill. App. 47, 58-59, the court said:

> ". . . Plaintiff started across the crosswalk with the green light in her favor and at the same time the streetcar from which she had alighted also started westward to cross the intersection. It is a reasonable inference from the evidence that the motorman started across the intersection with the green light in his favor. Plaintiff had a right to assume that vehicles approaching from the south and north would operate toward and over the intersection at a reasonable rate of speed; that they would keep a reasonably careful lookout for plaintiff; that the driver of a vehicle would have it under such control as would enable him to avoid collision with plaintiff, and that he would yield the right of way to her."

The court also quoted from Moran v. Gatz, 390 Ill. 478, p. 482:

> "In this case, appellee testified that he could not see a pedestrian approaching his car from the left, as the range of his city driving lights was to the right. It was therefore his duty to so drive his car as to have it under such control as to enable him to avoid collision with other vehicles or pedestrians, and whether he was driving in accordance with his duty to yield the right of way to pedestrians at a crosswalk was a question of fact for the jury."

In the instant case the jury could have believed that the cab driver was driving south without having his vision obscured by another car to his right. Under such circumstances, when he either saw or should have seen the plaintiff, his liability would have been a jury question. The same rule would apply if, in accordance with the testimony of Renner, the jury believed that defendant's driver was making a left turn from North Avenue to go south on LaSalle Street.

Defendant finally urges that the verdict for the plaintiff is against the manifest weight of the evidence.

In Vasic v. Chicago Transit Authority, 33 Ill. App. 2d 11, we had before us a case in which the plaintiff was struck by a bus at the intersection of Adams and State Streets in Chicago. The bus was making a right turn into Adams Street. The jury rendered a verdict of not guilty on behalf of the defendant, upon which judgment was entered, and we affirmed the judgment. In this court, as in the instant case, it was argued that the verdict was against the manifest weight of the evidence. In that case we discussed the function of a reviewing court where it is alleged that the verdict is against the manifest weight of the evidence, and we quoted from Read v. Cummings, 324 Ill. App. 607, 59 N.E.2d 325, where the court said, with reference to a reviewing court setting aside a verdict and judgment because they are against the manifest weight of the evidence:

> ". . . This court in passing on the question must take into consideration not only the verdict of the jury but the fact that the trial judge saw and heard the witnesses, overruled the motion for a new trial and entered judgment. It requires much more for this court to set aside a verdict and judgment than is required of the trial judge. . . . the question of the preponderance of the evidence does not arise at all in this court. [Citing cases] . . ."

In the Vasic case we say:

> ". . . In order for the court to determine that the verdict is against the manifest weight of the evidence an opposite conclusion must be clearly evident or the jury's verdict palpably erroneous and wholly unwarranted from the manifest weight of the evidence. Benkowsky v. Chicago Transit Authority, 28 Ill App2d 257, 171 NE2d 416. A verdict will not be set aside merely because the jury could have found differently or because judges feel that other conclusions would be more reasonable. Kahn v. James Burton Co., 5 Ill2d 614, 126 NE2d 836. In Devine v. Delano, 272 Ill 166, 180, 111 NE 742, 748, the court says:
>
> > 'A greater or less probability, leading, on the whole, to a satisfactory conclusion, is all that can reasonably be required to establish controverted facts. (1 Greenleaf on Evidence,--16th ed--sec 1; Commonwealth v. Webster, 5 Cush 295; 11 Am & Eng Ency of Law, --2d ed--490.)'"

In Ney v. Yellow Cab., 2 Ill. 2d 74, 117 N.E.2d 74, the court says:

> "Questions of negligence, due care and proximate cause are ordinarily questions of fact for a jury to decide. The right of trial by jury is recognized in the Magna Charta, our Declaration of Independence and both our State and Federal constitutions. It is a fundamental right in our democratic judicial system. Questions which are composed of such qualities sufficient to cause reasonable men to arrive at different results should never be determined as matters of law. The debatable quality of issues such as negligence and proximate cause, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness and necessity of leaving such questions to a fact-finding body. The jury is the tribunal under our legal system to decide that type of issue."

In the Vasic case we further held that under the evidence in that case reasonable men might differ on the inferences which properly might be drawn from the evidence in the record.

It is apparent from the conflicting testimony in the record that some of the witnesses were mistaken or may not have been telling the truth. Their credibility was a matter which the jury had to determine. The case was tried before an experienced trial judge who heard the evidence and observed the witnesses on the stand, and who, by accepting the jury's verdict as proper, placed his seal of approval upon the jury's determination of which witnesses were telling the truth.

Under those circumstances, we cannot say that reasonable men could not differ on the inferences which properly might be drawn from the evidence adduced in the case. Nor can we say that the jury's verdict was palpably erroneous and that from the evidence an opposite conclusion was clearly evident. The questions were for the determination of the jury. Had the jury found in favor of the defendant, we think that as in the Vasic case, we would have been constrained to uphold the verdict, and in this case the verdict for the plaintiff is not against the manifest weight of the evidence.

We have taken with the case a motion of the plaintiff to strike the abstract and brief filed by the defendant and a further motion to dismiss the appeal. Under the circumstances of our decision these motions are denied.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

ENGLISH, P.J., and DRUCKER, J., concur.

Abstract

No. 11822

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ELIZABETH JOHNSTON and EDWARD L. COBB, as Conservator of the Estate of ELIZABETH JOHNSTON, an incompetent person, Plaintiffs-Appellants, vs. CAROLINE S. MALM, et al, Defendants--Appellees.	Appeal from the Circuit Court of Winnebago County.

ABRAHAMSON--P. J.

The plaintiffs, Elizabeth Johnston and Edward L. Cobb, her son as well as her conservator, instituted this action against the defendants, seeking the rescission of a promissory note and trust deed securing it, a declaration that the defendants be declared trustees of all sums expended by or in behalf of Mrs. Johnston, and her restoration to the status quo existing prior to the execution of the agreements described in the complaint. At the conclusion of the plaintiffs' evidence the trial court granted the defendants' motion for judgment, and this appeal followed.

In their complaint the plaintiffs alleged the appointment of Cobb as his mother's conservator, her widowhood, and ownership of her unencumbered residence in Rockford, Illinois; that she

ship of her unencumbered residence in Rockford, Illinois; that she
of Cobb as his mother's conservator, her widowhood, and owner-

defendants' motion for judgment, and this appeal followed.

conclusion of the plaintiffs' evidence the trial court granted the
the execution of the agreements described in the complaint. At the
johnston, and her restoration to the status quo existing prior to
and trust deed securing it, a declaration that the defendants be
declared trustees of all sums expended by or in behalf of Mrs.
the defendants, seeking the rescission of a [illegible] deed
her son as [illegible] conservator, [illegible] the [illegible] Elton Planned

In their complaint the plaintiffs alleged the appointment

was not of sufficient mental capacity to know the nature and extent of her property, and was unable to transact her business; that in 1957 Mrs. Johnston employed the defendant, Arnold, as her agent to secure an investment property to produce income for her, and that Arnold, knowing Mrs. Johnston and aware of her disabilities, acted as her agent and occupied a fiduciary relationship with her; that on October 28, 1957, Arnold procured the signature of Mrs. Johnston on a note in the amount of $9,000, secured by a trust deed on her residence, and on a note in the amount of $14,500 secured by a trust deed on a duplex being purchased by her; that the documents were executed by Mrs. Johnston without independent advice and while under the disability known by Arnold; that the proceeds of the loan on her residence were applied in part payment of the purchase of the duplex, to which title was held by the defendant, John Parson, and Betty J. Parson, his wife; that John Parson was the son of W. W. Parson, a defendant; was an employee of W. W. Parson's Agency, a corporation, and was acting within the scope of his authority; that Arnold was either an employee of the corporation or closely connected with its operation, and at all relevant times was acting as agent for the defendants; that Arnold induced Mrs. Johnston to execute the documents by means of falsely and fraudulently representing that the duplex was rented and that its income was sufficient to pay the installments on both notes; that the sale price of the duplex in the amount of $23,500 was unreasonable, exorbitant, and exceeded its fair cash market value at that time; that the trust deed on the duplex was foreclosed and was sold for $18,000;

deed on the duplex was foreclosed and was sold for $18,000;
exceeded its fair cash market value at that time; that the trust
duplex in the amount of $25,500 was unreasonable, exorbitant, and
pay the installments on both notes, that the sale price of the
that the duplex was rented and that its income was sufficient to
the documents by means of fallacy and fraudulently representing
the defendants, that Arnold induced Mrs. Johnston to execute
its operation, and at all relevant times was acting as agent for
either an employee of the corporation or closely associated with
and was acting within the scope of his authority; that Arnold was
fendant, was an employee of M. C. Larson's Agency, a corporation,
his wife, that John Paris was the son of Mr. Larson, and
title was held by the defendant, John Paris, as Trustee,
applied to pay the monies of the Trust, Exhibit A
by Arnold, that the proceeds [illegible]
without knowledge and advice and were [illegible]
secured by a first deed of trust [illegible]
signature of Mrs. Johnston on a note in the amount of $25,500
ship with her; that on October 26, 1967, the plaintiff
disabilities, acted as her agent and [illegible]
ner, and that Arnold, knowing Mrs. Johnston [illegible]
ner urged to execute an instrument purporting to produce income for
that in 1957 Mrs. Johnston employed the defendant, Arnold, as
extent of her property, and was unable to transact her business;
was not of sufficient mental capacity to know the facts and

that the defendants, W. W. Parson, John Parson, Robert G. Arnold, and W. W. Parson's Agency, Inc., acted in concert and conspiracy against Mrs. Johnston; that the note and trust deed on the residence were sold to the defendant, Caroline Malm, who was still the holder thereof.

In all, the plaintiff called 14 witnesses in her behalf, including herself, and the defendants, John Parson and Robert G. Arnold, who testified adversely pursuant to the provisions of Section 60 of the Civil Practice Act, Illinois Revised Statutes 1957, Chapter 110, Section 60.

With the exception of the testimony of witnesses whose testimony will be analyzed in the succeeding paragraphs, the cumulative effect of the plaintiffs' witnesses was that: Mrs. Johnston was a 63 year old widow in October of 1957, employed in a local restaurant; at times in the past and subsequently she was subject to what her son and friends termed as "spells", during which she would change from a quiet person to one who was loud, boisterous, and given to the use of profanity; during these spells she was inclined to lead people to believe that she was a person of some means, and would accompany the witness, Thomas Need, to night clubs and taverns, attired in loud clothing, wearing colored horn rimmed glasses at night, and prone to buy drinks for strangers; on one occasion she paid for drinks with a hundred dollar bill and permitted the waitress to keep the change; there was no evidence tendered establishing her sobriety or the lack of it at the time of this latter incident; Need was a former roomer of Mrs. Johnston, who in-

incident. Need was a former coworker of Mrs. Johnson, who in-

dicated that when she was in one of her spells she would talk loud, have a real crazy laugh, but he did not mean to imply by that that she was unbalanced; it was his opinion that she should not conduct business in the gay atmosphere in which she lived at that time, but that she was not unbalanced, but rather became a carefree type, living as though she were 20 years younger; he did not know if her mood was rational or irrational in October of 1957.

On one occasion she employed a man to remove a dead tree, or the limb of a tree, from the rear yard of her residence and plant it in the front yard . On another occasion Mrs. Johnston purchased a motor vehicle for her granddaughter for the sum of $2,000 without any effort to negotiate with the salesman.

The defendant, Robert Arnold, testified that he was a licensed real estate broker, employed by W. W. Parson for approximately 25 years, and that he knew Mrs. Johnston for 45 to 50 years. In the fall of 1957 she contacted him and evinced an interest in the purchase of some investment property, whereupon he informed her of the availability of the duplex, which she subsequently purchased.

Arnold testified that the duplex was rented and had an income of $180 a month and that the mortgage payments on the $14,500 loan were $145 per month. If a loan in the amount of $9,000 was procured on her residence it would require a payment of $90 a month, leaving a deficiency of $55 a month to be made up in some manner. He did not know how she was going to do this, but he was aware of the fact that she was employed.

The documents in question were prepared by Parson's Agency and Arnold took them to her home, where he remained approximately one hour, during which time she had them in her possession for possibly half of that time before signing them. Mrs. Johnston's granddaughter and her husband were present in the home, but not in the same room at the time of their execution.

The defendant, John Parson, testified that he was the son and employee of W. W. Parson, who died on August 2, 1960; that he and his wife, who was not made a defendant, held title to the duplex for the benefit of his father, W. W. Parson, and R. M. Mott, who was also not made a party defendant; that the witness had no interest in the duplex, received no portion of the proceeds of its sale, and that the conveyance to Mrs. Johnston was made as directed by the beneficial owners.

The witness, Arthur Grams, was a general contractor who was called to testify regarding the value of the duplex, but whose testimony was ruled inadmissible. The plaintiff made an offer of proof that Grams was a builder and in the real estate business for a period of ten years, and that in the year 1957 he erected 5 two-family dwellings in Rockford and its environs; that on February 11, 1963, he examined the outside of the duplex, measured the exterior of the building, and looked in the windows; that based on his experience and knowledge the fair cash market value of the duplex in 1957 was $17,500.

Although not a party to the litigation, John Malm testified under the provisions of Section 60 that he purchased the $9,000 promissory note and trust deed securing it on Mrs. Johnston's residence on behalf of his wife, who had had no contact with Parson or any member of his agency. He had never met Mrs. Johnston and knew nothing about her when he purchased the docu-

ments in question. Payments were made periodically until Mr. Parson became ill, when they lapsed, but were resumed again in September of 1960.

Mrs. Johnston testified that she knew the nature of Arnold's business and contacted him to talk about buying some property, but did not tell him why she wanted to buy the duplex. She was regularly employed at the time, believed that the price of the duplex was $23,500, and that she did receive a statement regarding the transaction after she had signed the papers, but did not discuss the matter of its purchase with anyone.

Marion Cobb, the daughter-in-law of Mrs. Johnston, testified that she and her husband did not learn that Mrs. Johnston had purchased the duplex until November of 1959. Mrs. Johnston had not paid the taxes on her residence because she said that the City of Rockford did not need her money. In the first part of January, 1960, a bill for insurance from the Parson Agency was received for the duplex and she and her husband met with Arnold and Mr. Parson, and the Cobb's attorney, at which time they apparently discussed Mrs. Johnston's purchase of the duplex.

In September of 1960 John Malm had contacted the Cobbs' attorney to inform him that the mortgage on the Johnston residence was unpaid and was about to be foreclosed. The Cobbs apparently brought the interest payments on the note to a current basis.

Additionally, the plaintiff called Dr. Carl Hamann who testified that when he first met Mrs. Johnston in October of 1961, his diagnosis of her condition was manic depressive of a sufficient degree to warrant that she remain under his care until

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In September of 1900 John Klein had contacted the with Arnold and Mr. Parson, and the Cobb's attorney, at which time they apparently discussed Mrs. Johnston's purchase of the duplex. Agency was received for the duplex and the understand first part of January, 1900, a letter for disclosure to the Parson said that the City of Rockford did not need [illegible]. In the Mrs. Johnston had not paid the taxes as per Parsonic because and Johnston, testified that she and not a board of [illegible] that signed the paper, but did not disclose the matter of the p- receive a state until [illegible] the transaction. Mrs. Johnston had buy the duplex. She was [illegible] buy [illegible] buying solely [illegible] Mr. Johnston testified that he [illegible] nature of Arnold's business and [illegible] again in September of 1900.

Mrs. Johnston testified that she [illegible] Mr. Parson became ill, when they left, but were [illegible] ments in question. Rent [illegible] until

1/6 amr 5/29/64

December 31, 1961. The doctor indicated his opinion to be that Mrs. Johnston was incompetent when she was in a manic state and could not transact business with good judgment, for the reason that she would base everything on unrealistic opinions.

When the plaintiffs' counsel sought to pose a hypothetical question to Dr. Hamann regarding the competency of Mrs. Johnston on October 28, 1957, which would incorporate the testimony of all the witnesses who had previously testified to her condition, the court refused to permit this.

In a suit to rescind documents because of the alleged mental incapacity of the maker or grantor, it is the burden of the party seeking rescission to establish the incompetency by a preponderence of the evidence. Old age, eccentricity, or even the partial impairment of the mental faculties, is not necessarily sufficient to warrant their rescission, and the rule is that if the party has sufficient mental capacity to comprehend the nature of the transaction, its meaning and effect, and is able to protect his own interest, the note and the deed will not be set aside. Campbell v. Freeman (1921) 296 Ill. 536, 130 N. E. 319; Johnson v. Lane (1938) 369 Ill. 135, 15 N. E. 2d 710.

If a person is capable of understanding in a reasonable manner the nature and character of the transaction in which he is engaged, and of transacting ordinary business affairs in which his interests are involved, he is competent to dispose of his property by deed and to encumber it with a mortgage or trust deed. Lucas v. Westray (1951) 408 Ill. 243, 96 N. E. 2d 623; Greathouse v. Vosburgh (1960) 19 Ill. 2d 555, 169 N. E. 2d 97.

December [illegible], 1961 [illegible] that Mrs. Johnston was [illegible] and could not transact [illegible] that she [illegible]

[illegible] plaintiffs' [illegible] question [illegible] witnesses [illegible]

[illegible] incapacity [illegible] the party [illegible] preponderance of the evidence [illegible] parties [illegible] sufficient to [illegible] of the transaction [illegible] his own interest [illegible] Campbell v. [illegible] (1941) 376 Ill. [illegible] v. [illegible] (1955) 309 Ill. [illegible] 2d [illegible]

If a person is capable of understanding [illegible] manner the nature and character of the transaction [illegible] engaged, and of transacting ordinary business affairs [illegible] interests are involved, he is competent to dispose of his property by deed and to encumber it with a mortgage or trust deed. [illegible] v. Westray (1951) 408 Ill. 243, 96 N.E. 2d 625. Greathouse v. Vosburgh (1960) 19 Ill. 2d 555, 169 N.E. 2d 97.

The plaintiffs' proof regarding the alleged incompetency of Mrs. Johnston on October 28, 1957, falls short of that quantum of proof required, and, at best, establishes that Mrs. Johnston was a person of varying eccentricities which did not substantially impair her faculties and preclude her from knowing and approving the nature and ramifications of the transactions assailed.

We agree with the court that the evidence of the lay witnesses regarding the alleged incompetency of Mrs. Johnston in nowise established, nor tended to establish, her incompetency, but at best indicated a person of changeable mood. Admittedly, a non-expert witness may be permitted to express his opinion regarding the mental capacity of another, but it is necessary that he relate facts from which a court may determine that he is able intelligently to express an opinion upon mental capacity. Hosier v. Thrush (1949) 402 Ill. 503, 84 N. E. 2d 366.

The court's findings of fact in this respect are correct and will not be disturbed, because the decree is clearly not against the weight of the evidence. Johnson v. Lane (1938) 369 Ill. 155, 15 N. E. 2d 710.

In addition, the court's refusal to permit Dr. Hamann to express an opinion regarding Mrs. Johnston's mental condition 4 years prior to the date of his first examination was proper, for the reason that the hypothetical question to be posed to the doctor would have involved the rendition of an opinion based upon facts which the court had previously and on separate occasions ruled inadequate to support opinion evidence. 15 ILP Evidence Sec. 330.

In connection with the issues regarding the existence of

a fiduciary relationship, we would like to observe at the outset that the plaintiffs alleged in paragraph 4 of their complaint that the defendant, Arnold, was employed by Mrs. Johnston as her agent to locate, secure and obtain an investment to produce income for her, the purpose of which apparently was to have Arnold occupy a fiduciary relationship with Mrs. Johnston, yet in paragraph 10 of their complaint the plaintiffs alleged that at all times the defendant, Arnold, was acting as agent for the remaining defendants, the purpose of which was apparently to establish a relationship among the defendants, making Arnold's allegedly improper conduct imputable to them.

Neither the complaint nor the evidence adduced in its support informed us regarding prior dealings between Mrs. Johnston and Arnold which would have given him actual or constructive knowledge of her alleged incapacity. Because he who alleges must prove', we cannot indulge in any presumption that he possessed such knowledge and in the absence of any evidence on this question, we can only properly infer that he possessed none.

Admittedly, Mrs. Johnston was the aggressor in this matter in the sense that she contacted Arnold, knowing that he was a real estate broker engaged in the sale of real estate, from the proceeds of which he would derive a commission. Except under uncommon circumstances, a real estate broker or salesman acts in behalf of the seller, and when he has produced a purchaser ready, willing and able to buy on the seller's terms, he has discharged his obligation and is entitled to his commission.

Under the circumstances of the case at bar, Arnold's original position was that of agent for the owners of the duplex

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Arnold owed a fiduciary relationship with Mrs. Johnston, not

income for her, the purpose of which obviously was to have

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set that the plaintiffs alleged in paragraph 4 their complaint

a fiduciary relationship, we would like to observe at the out-

in question, and it will be presumed that he continued to act as agent for the same principals until it had been established that that relationship was terminated and a new relationship created with Mrs. Johnston.

In effect, the plaintiffs have sought to have a resulting constructive trust impressed upon the proceeds of the various notes and trust deeds by showing a breach of the fiduciary relationship owed to Mrs. Johnston by Arnold and the other defendants.

It is the rule in Illinois that to establish a fiduciary relationship by parol evidence, the proof must be clear, convincing and so strong, unequivocal and unmistakable as to lead to but one conclusion, and the burden of establishing that relationship is upon the one who alleges its existence. Johnson v. Crane (1938) 369 Ill. 135, 15 N. E. 2d 710.

In Pfaff v. Petrie (1947) 396 Ill. 44, 71 N. E. 2d 340, the plaintiff was a 74 year old widow, not strong physically, and somewhat lame as the result of a stroke. The defendants were friendly with the plaintiff, who wasabout to lose her home by reason of her mortgage being in default, taxes for the years 1938 to 1945 were unpaid, and three judgments had been rendered against her. The plaintiff executed a quit claim deed to the defendants who moved into the plaintiff's home, where they were residing at the time of the trial. The plaintiff instituted an action seeking the cancellation of the deed, alleging fraud in the execution and breach of the fiduciary relationship said to exist between the parties. In discussing the creation and obligations imposed by a fiduciary relationship, the court said:

Broad though the limits of a fiduciary relation may

court said:

> Broad though the limits of a fiduciary relation may

> be, nonetheless there are [illegible] where, as here, the evidence adduced at the trial wholly fails to establish a fiduciary relationship. A fiduciary relationship must be based on something more than that the fact that the parties are neighbors and that a friendship exists between them. There is no evidence of previous business dealings between the parties, no evidence that plaintiff sought or received defendants' advice in her business affairs, no appreciable evidence of mental weakness or an unconscionable contract--in fact, no evidence that the plaintiff reposed trust and confidence in the defendants. ***As prospective buyer and seller, the parties stood on opposite sides, each seeking to further his own best interests. It is obvious that the continuing relation of buyer and seller lends no credence to plaintiff's contention relative to the existence of a fiduciary relationship. When a relationship of trust and confidence is established, the burden is on the grantee to show that the agreement is eminently fair and was procured without the exercise of undue influence. Staufenbiel v. Staufenbiel, 368 Ill. 511, 15 N.E. 2d 369. On the other hand, the initial burden of proof is on the party seeking relief to show the existence of a fiduciary relationship. Stewart v. Sunager, 394 Ill. 209, 68 N.E. 2d 268; McGlaughlin v. Pickerel, 381 Ill. 574, 46 N.E. 2d 500. This, plaintiff has failed to do. Both the Master and the Chancellor found against plaintiff on this issue. Under such circumstances, we are not justified in disturbing that finding, unless it is manifestly against the weight of the evidence.

There are other Illinois cases supporting this statement of principles, which it would serve no useful purpose to enumerate here. When the facts of the instant case are tested in the light of these cases, it becomes apparent at once that both the allegations of the complaint and the proof fail to establish a fiduciary relationship between Mrs. Johnston and any one of the defendants. It was obligatory upon the plaintiffs to show the existence of the fiduciary relationship between Mrs. Johnston and one or more of the defendants, and at best the evidence tends to establish W. W. Parson to be the principal, Robert Arnold to be his agent, and Mrs. Johnston to be a purchaser interested in buying investment property. This

obviously is insufficient to show the existence of a fiduciary relationship and its breach to the detriment of Mrs. Johnston.

Even if the plaintiffs had established the incompetency of Mrs. Johnston, she could not obtain the rescission of the note and trust deed securing it on her residence premises, for the reason that Caroline Malm entered into the contract in question in good faith and without any actual or constructive knowledge of the alleged incompetency of Mrs. Johnston. In this connection, it is the Illinois rule that where the opposite party has dealt with one mentally incompetent, in good faith and without knowledge of his insanity, the demand for rescission, to be effective, must be accompanied by an offer to restore the opposite party to his original position, (Brandt v. Phipps (1947) 396 Ill. 296, 75 N. E. 2d 757; 26 ILP Mental Health, Section 55) which the plaintiffs have not done.

The plaintiffs failed to discharge the burden of proof imposed upon them under the circumstances of this case, and the court properly entered judgment for the defendants at the conclusion of the plaintiffs' case.

The judgment of the Circuit Court of Winnebago County is affirmed.

JUDGMENT AFFIRMED.

CARROLL, J. and MORAN, J. concur.

is affiliated.

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50 I.A.2d 243

49175

LEONARD BONE, JEAN BONE, and LEONARD BONE, JR.; ALFRED BONE and HAROLD BONE, Minors, by JEAN BONE, their Mother and Next Friend,

Plaintiffs-Appellees,

v.

RAY JOHNSON and CLAUDE DICKENS, d/b/a ROCKFORD TAP; STANLEY KOLODZIEJ and KATE KOLODZIEJ, STELLA S. KORDECKI, d/b/a STELLA'S TAP, and STELLA LIPINSKI,

Defendants,

On Appeal of STELLA LIPINSKI,

Defendant-Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

On August 16, 1955 plaintiffs brought suit against defendants under the Dram Shops Act (Ill. Rev. Stat. 1963, ch. 43) for damages sustained by Leonard Bone as the result of injuries inflicted by a person who had become intoxicated by consuming alcoholic liquors sold in two separate taverns, one operated by defendants Ray Johnson and Claude Dickens as Rockford Tap, the other operated by defendants Stanley Kolodziej, Kate Kolodziej, and Stella Kordecki (a/k/a Stella Lipinski) as Stella's Tap. Pursuant to hearing, judgment was entered on June 23, 1959 against Stella Lipinski, owner of the property as well as part operator of Stella's Tap, in the sum of $5000.00; all the other defendants were dismissed from the suit.

Over three years later, on November 28, 1962, Stella Lipinski filed a petition praying that the June 23, 1959 judgment order be vacated. In her petition she represented, in part, that she had been served with summons in the original suit and had retained counsel who subsequently, on June 19, 1958, withdrew as her attorney; and that she was uninformed as to the legal effect of the alleged notices served on her. Plaintiff in his answer stated, inter alia,

that by reason of the judgment in this suit he was made a party to a mortgage foreclosure suit brought against Stella Lipinski which was dismissed on March 7, 1962; that following that action his counsel made two separate and unsuccessful attempts to settle the judgment with different attorneys representing Stella Lipinski; that because plaintiff was unable to negotiate a settlement his counsel informed Stella Lipinski by letter that plaintiff was compelled to proceed with a levy against her real estate; that on October 4, 1962 she was notified that an execution had been taken out against her property and that levy would be made on October 15, 1962; that not until the latter part of November 1962, after levy on said property, did she file her motion to vacate said judgment; and that she had had due notice of all the proceedings herein and had been guilty of lack of diligence in attempting to vacate the judgment.

On February 5, 1963, pursuant to hearing, Judge Epstein entered an order denying Stella Lipinski's petition to vacate the judgment. On March 4, 1963 Stella Lipinski made a motion to vacate the order entered February 5, 1963 and to reconsider the return as proof of service as challenged by her. In an affidavit filed in support of the motion her counsel stated that he had thoroughly examined the register and the docket pertaining to the case and that nowhere did it appear of record as an affirmative defense that Stella Lipinski, prior to or subsequent to June 16, 1959, had ever received by certified mail a mailing notice "certified" to her at her address; and that nowhere did it appear in the register or the docket that she had ever received or accepted by authorized authority the alleged copy of notice and mailing affidavit by certified mail. Plaintiff filed an answer to the motion in which he asserted that the affidavit of service referred to by counsel for Stella Lipinski constituted a full and adequate return of service of notice on her.

On March 21, 1963, pursuant to hearing, Judge Epstein denied Stella Lipinski's motion.

Stella Lipinski prosecutes this appeal from the order entered February 5, 1963 denying her petition to vacate the judgment against her, and also from the order entered March 21, 1963 denying her motion to vacate the February 5, 1963 order.

As the principal ground for reversal it is urged that Stella Lipinski was not served with notice of the hearing in the original suit, and that accordingly Judge Epstein was in error in not entering orders which would have vacated the judgment entered against defendant in the original suit. However, the language of the judgment order of June 23, 1959 refutes defendant's contention that she was not served with notice of hearing; the order reads as follows:

> "This cause having been assigned for Pre-Trial on the regular call of the calendar and having been set for pre-trial on January 29, 1959 at 10:00 A.M., and having been continued thereafter to the following dates, to-wit: March 16, 1959, May 18, 1959, June 1, 1959, June 9, 1959 and June 18, 1959 and the defendant Stella Kordecki, a/k/a Stella Lipinski having been served with notice by certified mail, return receipt requested, of the motion of plaintiffs for hearing on their complaint and the answer of the defendant, Stella Kordecki, a/k/a Stella Lipinski, waiving trial by jury, and the Court having jurisdiction of the parties and subject matter and having heard the evidence adduced by the plaintiff, Leonard Bone, and further that the said defendant failed to appear in accordance with notice duly given, this Court finds the defendant, Stella Kordecki, a/k/a Stella Lipinski guilty on Count I of the plaintiff's Complaint and assesses the plaintiff's damages at the sum of $5,000.00.
>
> "Therefore, It Is Ordered by the Court that the plaintiff, Leonard Bone, have and recover, of and from the defendant, Stella Kordecki, a/k/a Stella Lipinski, his said damages of $5,000.00, in form as aforesaid by the Court assessed, together with his costs and damages in this behalf expended, and have execution thereof.
>
> "It Is Further Ordered that Ray Johnson, Claude Dickens, Stanley Kolodziej and Kate Kolodziej be and are hereby dismissed as party defendants, no costs."

In the pleadings which Stella Lipinski filed in an attempt to set aside the judgment order she did not present a report of

proceedings, and in a reconsideration of the matter Judge Epstein was required to assume that the court's findings with respect to service of notice, as heretofore set forth, were correct; under such an assumption he was required to enter orders upholding the judgment.

Accordingly, the orders entered by Judge Epstein are affirmed.

ORDERS AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

(338)

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(50 I.A.2 338)

No. 64-20 Agenda 37

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

RAY H. JONES, Plaintiff-Appellant, vs. LOCAL #179, INTERNATIONAL HOD-CARRIERS, BUILDING AND COMMON LABORER'S UNION OF AMERICA, Defendant-Appellee.	Appeal from the Circuit Court of Madison County, Illinois.

WRIGHT, Justice.

Plaintiff, Ray H. Jones, filed this suit in the Circuit Court of Madison County, Illinois, against defendant, Local #179, International Hodcarriers, Building and Common Laborer's Union of America, alleging that the defendant allowed the City of Edwardsville, Illinois, a municipal corporation of the State of Illinois, to discharge and lay the plaintiff off from his employment with said city. The case was tried before the court without a jury and the court at the conclusion of the case entered judgment in favor of the defendant and against the plaintiff. From this judgment, plaintiff appeals.

The complaint filed by the plaintiff herein alleges in substance: That the defendant is a labor union organized and existing under the laws of the State of Illinois, and that

plaintiff is a member of said union; that on the 5th day of April, 1956, plaintiff was employed and became an employee of the City of Edwardsville, Illinois, in the City Sewage Reduction Plant; that in November, 1956, plaintiff was transferred from the Sewage Reduction Plant to the Street Department of said city in which department he remained until May 1, 1957; that this transfer was by the mutual agreement of the defendant, the city and the plaintiff; that on May 1, 1957, plaintiff was sent out of the Street Department by the then superintendent by verbal order to work in the Sanitation Department of the city over the protest and objections of the plaintiff. The complaint further alleges that there existed a certain Memorandum of Understanding or Resolution of policy agreed to by the city and the defendant concerning seniority of the city employees, and further alleges that the defendant notwithstanding said memorandum of agreement on the 24th day of January, 1962, wrongfully allowed plaintiff to be laid off by the city as the city reduced the number of men in its Sanitation Department. It is further alleged that plaintiff's departmental seniority is rightfully in the Street Department, from which he was wrongfully moved, over his protest and objection, and it is further alleged that the moving of plaintiff out of the Street Department and assigning him to the Sanitation Department on May 1, 1957, over his protest and objection, was wrongful in that his departmental seniority was wrongfully taken from him thereby and, therefore, he was wrongfully laid off from work and has suffered damages therefrom and prays damages in the sum of $50,000.00 for actual

and punitive damages.

The trial court in its judgment order entered against the plaintiff at the conclusion of the testimony made the following two findings of fact. (1) That plaintiff has failed to prove that Local #179, International Hodcarriers, Building and Common Laborer's Union of America, defendant, was responsible or in any way had any final control over the City of Edwardsville, employer of said plaintiff, and (2) That the defendant has performed its duties relating to the labor dispute existing between the City of Edwardsville and the defendant, Ray H. Jones, in a reasonable manner.

The plaintiff, who is not an attorney, represents himself pro se in this case and the only reason advanced in his brief and argument before this court for reversal of the judgment is the following statement: "The plaintiff feels that the evidence presented clearly shows beyond a reasonable doubt that the defendant is guilty of having wrongfully allowed the City of Edwardsville, Illinois, to lay him off on January 24, 1962." The brief of plaintiff filed herein does not contain any points or cite any authorities to support them. In fact, the brief and abstract of record filed by this plaintiff herein violate many rules of this court and under normal circumstances this appeal would be dismissed as requested by the defendant. However, since the plaintiff appears pro se, we have in this instance allowed a certain degree of latitude to him and have considered the case on its merits. This should not be considered any precedent for such flagrant violations of the rules of this court in the future.

On February 21, 1962, prior to filing the instant case, the plaintiff, Ray H. Jones, filed a suit in the Circuit Court of Madison County, Illinois, bearing Clerk's File No. 62-L-122, in which cause he sued the City of Edwardsville, Illinois, for damages based upon the same facts alleged in the instant complaint. The complaint in that case on motion of the defendant, City of Edwardsville, was dismissed for failing to state a cause of action and no appeal was taken therefrom.

The plaintiff by the instant action seeks to have the court impose liability on his own union for an act committed by a third party, the City of Edwardsville, as to which act said third party has been held by a court of competent jurisdiction to be not liable. Certainly, the defendant cannot be held liable for the act of the City of Edwardsville of discharging or laying plaintiff off when such act has been adjudicated by a court of competent jurisdiction and found not to be wrongful.

It is further our opinion that the complaint herein and the evidence in the record before us, which we have carefully considered, does not allege or prove sufficient facts to constitute any cause of action against the defendant. There is a complete lack of allegations or evidence to show any legal duty imposed upon the defendant or any breach of such legal duty running from the defendant to the plaintiff herein.

Because this cause was heard by the court without a jury, the trial court's findings of fact are entitled to the same weight as a jury verdict, and this court, on appeal is guided by the same principles as would apply to a jury's

verdict. Balfour v. Balfour, 20 Ill. App. 2d 590, 156 N. E. 2d 629. The findings of the trial court will not be disturbed unless they are manifestly against the weight of the evidence. Fox v. Fox, 9 Ill. 2d 509, 138 N. E. 2d 547.

We have thoroughly considered the evidence in the record before us and are convinced that the findings of the trial court are supported by the evidence in the record and are not clearly and manifestly against the weight thereof. Under such circumstances, a court of review will not disturb such finding. Rude v. Selbert, 22 Ill. App. 2d 477, 161 N. E. 2d 39.

The judgment of the Circuit Court of Madison County is affirmed.

A F F I R M E D.

DOVE, P. J. and REYNOLDS, J., Concur.

PUBLISH ABSTRACT ONLY

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 10503

Agenda No. 6

Gerald Childress and Jack Childress, Plaintiffs-Appellants, vs. State Farm Mutual Automobile Insurance Company, an insurance corporation, Defendant-Appellee.	Appeal from the Circuit Court of Champaign County

Per curiam.

Plaintiffs, Gerald Childress and Jack Childress, hereafter called Childress, brought a suit in two counts against State Farm Mutual Automobile Insurance Company, hereafter called State Farm. The Complaint sought damages in the amount of $750,000.00 for claimed negligence, claimed contractual breaches of duty and bad faith. The trial court dismissed the complaint on motion and the plaintiffs elected to stand by the complaint and have appealed to this court for a reversal. Each plaintiff's claim was presented in a separate single count and each count of the complaint was essentially similar. Therefore, our discussion of the complaint, for the sake of clarity, will proceed as though the complaint was in a single count.

per curiam.

Plaintiff Gerald Childress, driving a car in his own name, was insured by defendant State Farm Mutual Automobile Insurance Company, hereinafter called State Farm. The complaint sought damages in the amount of $25,000.00 for claimed negligence, claimed contractual breaches of duty and bad faith. The trial court dismissed the complaint on motion and the plaintiffs elected to stand by the complaint and have appealed to this court for a reversal. Each plaintiff's claim was presented in a separate single count and each count of the complaint was essentially similar. Therefore, our discussion of the complaint, for the sake of clarity, will proceed as though the complaint was in a single count.

It was alleged in the complaint that Childress was a member of the State Farm, and on December 16, 1956, Childress had an automobile liability policy with that company on a 1956 Chevrolet with limits of $10,000.00/$20,000.00 for bodily injury liability. Certain portions of the policy were set out in haec verba in the complaint, but it is obvious from the complaint that much of the policy was not pleaded in the complaint and no copy of the policy was attached to the complaint.

It was alleged that on December 16, 1956, Jack Childress, who was a minor residing in the home of Gerald Childress, while driving an automobile other than the Chevrolet described in the policy, was involved in a serious collision causing permanent injuries to Marilyn Heien. Childress claimed that he was legally responsible for the use of the automobile driven by Jack Childress according to the language of the policy and claimed that the car was not excepted from the terms of the policy. The exceptions to the policy were not set out in the complaint.

Childress alleged that State Farm had immediate knowledge of the collision and injuries. He also stated in his complaint that Country Mutual Insurance Co. made a complete investigation of the collision. According to the complaint, Marilyn Heien brought a suit in the Circuit Court of Champaign County against Jack and Gerald Childress, and Country Mutual undertook the defense of the suit under its policy. It is alleged that Heien's attorney wrote

It was alleged in the complaint that Childress was a member of the State Farm, and on December 17, 1956, utilized his automobile liability policy with that company on a 1956 Chevrolet with limits of $10,000.00/$20,000.00 for bodily injury liability. Certain portions of the policy were set out in haec verba in the complaint, but it is obvious from the complaint that much of the policy was not pleaded in the complaint and no copy of the policy was attached to the complaint.

It was alleged that on December 20, 1956, Jack Childress, who was a minor residing in the home of Gerald Childress, while driving an automobile other than the Chevrolet described in the policy, was involved in a serious collision causing permanent injuries to Marilyn Heiam. Childress claimed that he was legally responsible for the use of the automobile driven by Jack Childress according to the language of the policy and claimed that the car was not excepted from the terms of the policy. The exceptions to the policy were not set out in the complaint.

Childress alleged that State Farm had immediate knowledge of the collision and injuries. He also stated in his complaint that Country Mutual Insurance Co. made a complete investigation of the collision. According to the complaint, Marilyn Heiam brought a suit in the Circuit Court of Champaign County against Jack and Gerald Childress, and Country Mutual undertook the defense of the suit under its policy. It is alleged that Heiam's attorney wrote

State Farm in 1961 and advised State Farm of the suit against Childress and recommended that State Farm familiarize itself with the case since it had a right to participate in the defense of the suit according to its policy. Childress then alleged that he was not experienced in insurance matters and did not realize that coverage might be extended to him under the State Farm policy but when State Farm contacted him in 1961, he cooperated with State Farm and performed all conditions required of him.

It was stated that the policy either provided protection to Childress or was ambiguous and capable of construction so as to extend coverage to the plaintiffs. Next Childress claimed that State Farm was the one most familiar with the policy construction and was under a duty to promptly accept or disclaim coverage under the policy. Plaintiffs contend that State Farm did not promptly accept or disclaim coverage, but rather required each plaintiff to execute non-waiver agreements, which Childress claimed were in the form of offers. The non-waiver agreements provided as follows:

"The undersigned requests and authorizes State Farm Mutual Automobile Insurance Company to investigate, negotiate, settle, deny or defend any claim arising out of an accident occurring on or about December 16, 1956.

"It is agreed that such actions shall not waive any of the rights of the undersigned or of the company under any contract of insurance."

"Dated at Urbana, Illinois, this 17th day of March, 1961.

Jack N. Childress
Gerald Childress
Lorene Childress"

Childress then alleged that State Farm accepted the offers and undertook the investigation and defense of the suits brought against Childress, and that Childress relied upon State Farm's representations that it was acting with skill, diligence, good faith and expertise. The complaint then stated that Country Mutual surrendered to Childress and Childress delivered to State Farm all information from the investigation and trial file of Country Mutual and that State Farm was completely apprised of all relevant matters to the suit and that State Farm was not prejudiced by the delay in the receipt of notice of the claim. It was stated that thereafter neither Country Mutual's attorneys nor Childress' personal attorney took any further part in the litigation.

Childress then claimed that when he delivered these materials to State Farm and thus was deprived of Country Mutual's file, he could not have defended the litigation. He also stated that the litigation could have been settled within State Farm's policy limits and that good faith and sound judgment dictated that such settlement be made.

According to the complaint, the suit was set for trial on January 29, 1962, and an evidence deposition was set in Monroe,

According to the complaint, the suit was set for trial on January 29, 1962, and an evidence deposition was set in Monroe,

Louisiana on December 15, 1961. It was stated that State Farm had notice of the trial setting and deposition. Childress claims that State Farm, by its acceptance of the offers contained in the non-waiver agreements expressly assumed the defense of the litigation and was obligated to defend and to use care, skill and good faith in the defense, whether or not coverage was afforded by the policy.

Childress asserted that State Farm committed or omitted certain negligent acts, acts in bad faith or breaches of an express contractual duty, as follows: a. failed to settle within the policy limits; b. failed to appear at the evidence deposition; c. failed to advise Childress of the deposition; d. failed to call up for hearing the motion pending on behalf of Childress or file an Answer for Childress; f. failed to use diligence in communicating with Childress concerning the trial date; g. failed to appear at the trial so as to allow incompetent and prejudicial evidence to be introduced with a resulting large verdict.

Finally Childress alleged that as a direct and proximate result of one or more of these negligent acts or contractual breaches of duty or acts committed in bad faith, he had been damaged thereby. Childress prayed judgment against State Farm in the amount of $750,000.00, interest and costs, and requested trial by jury.

In this Court, Childress claims that this suit is not a suit on the policy but rather a suit only for negligent breach of an agreement to defend assumed by State Farm. However, there is

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contain negligent acts, acts in bad faith or breaches of an express

in the default, whether or not reduced to a judgment by the policy

and was obligated to defend and to pay same, until the policy

waiver of premium, expressly assumed this obligation. A prior

State Farm, by its assignment of the claim against [illegible]

notice of the trial within [illegible]. Subsequent [illegible]

Quotations on December 15, [illegible]. I was told that [illegible]

nothing in the record which would show that this was the position submitted to the trial court, and from the record, the contrary would certainly appear.

We are now told that it was the assumption of the defense by State Farm, rather than the policy, which creates the liability. Surely it would not have taken a 3000 word Complaint to state facts to show that State Farm assumed the defense of a claim, (that is, owed a duty to the Plaintiff) was negligent in some manner in this defense (that is, breached this duty), that Childress exercised ordinary care in this situation and that as a direct and proximate result of the negligence of State Farm, Childress was damaged.

If this was the position of Childress in the trial court, then to say the least, his rare style of pleading a conglomeration of extraneous matters admittedly without relation to the issues in the case was an imposition on the trial court as well as this court.

Sometimes a thing may be identified by a process of elimination. That is, by declaring that which it is not, the inquirer can with a greater degree of accuracy predict what a thing is. In this case we can say that the complaint is not a suit on the policy, notwithstanding the allegations referring to the existance of a policy, statements about policy construction, policy limits and breaches of contractual duty. We can say this with some assurance for there is nothing in the record to show what the contract was.

We cannot imply a contract for there is not even a claim that there was any consideration to support a contract. So, we can

say that the complaint cannot be based on an implied agreement.

Thus, if a cause of action has been stated, it must of necessity be based on the negligent performance or non-performance of a duty gratuitously assumed.

Not to be outdone by the free style of plaintiff's pleading, the defendant filed a motion containing twenty-five paragraphs. Twelve paragraphs of the motion relied upon language of the policy thought to raise a defense to the suit on the policy. Defendant said that a copy of the policy was attached to the motion, but the record does not show this. Another eleven paragraphs were so wanting in merit as to fail to justify discussion. The defendant complained about conclusions in one paragraph of the motion and objected that the complaint was duplicitous.

Section 33 (2) of the Civil Practice Act provides, "Each separate claim or cause of action upon which a separate recovery might be had shall be stated in a separate count or counterclaim, as the case may be and each count, counterclaim, defense or reply, shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation."

Section 33 (3) of the Civil Practice Act provided, "Pleadings shall be liberally construed with a view to doing substantial justice between the parties."

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say that the complaint cannot be based on a stated premise.

Where allegations of a complaint are superfluous they may be disregarded as surplusage. Rovekamp v. Central Const. Co., 45 Ill. App. 2d. 441, 195 N.E. 2d. 756; Taylor v. Hughes, 17 Ill. App. 2d 138, 149 N.E. 2d. 393. It is a masterpiece of understatement to say that portions of the complaint are superfluous but we will treat them as surplusage in an attempt to dispose of this matter on the merits.

Inasmuch as the defendant has not urged duplicity in this court, we assume that it was its intention to waive this argument. Supreme Court Rule 39 IV (Illinois Revised Statutes, 1963, Chapter 110, § 101.39) provides in part, "A point made but not argued may be considered waived." "Vacuity of argument is not the way to get courts to decide issues." Pipitone v. Mandala, 33 Ill. App. 2d. 461, 180 N.E. 2d. 33.

The defendant has likewise failed to urge that the complaint was defective because conclusions were alleged.

We observe that it would be well for defendant's counsel to review our rules with respect to the organization and preparation of briefs for submission to this court.

Obviously, the defendant's brief does not justify the action taken by the trial court. We must turn from this then, and examine the plaintiffs' contention that this verbose, prolix instrument states a cause of action in negligence.

First we observe that plaintiffs do not specifically allege that they were in the exercise of ordinary care or were free from any conduct which proximately contributed to cause their damage. Thus we must scrutinize the complaint to see if facts are alleged from which such care on their part may be reasonably inferred. "It is well settled that freedom from contributory negligence, that is, the exercise of due care, is an essential allegation in the usual negligence action. (Hanson v. Trust Co. of Chicago, 380 Ill. 194) The reason assigned is that no one shall be permitted to profit from a wrong to which he contributed." Prater v. Buell, 336 Ill. App. 533; 84 N.E. 2d. 676.

The instant cause is not the usual negligence action to be sure, but it appears to us to be a situation where it would be incumbent upon the plaintiff to plead and prove that he was not a co-author of the situation of which he complains.

Plaintiff alleged that he cooperated in every way with the defendant and performed all conditions required on his part. He also alleged that he was deprived of the investigation file and could not have prepared for nor conducted an adequate defense.

We do not commend this pleading in any part but if we give a liberal construction to these allegations we conclude that the exercise of ordinary care may be inferred from such statements, and these statements will suffice. With regard to the charges of negligence, it is important to note that plaintiff claims only that the defendant assumed the defense of the suit. It is not charged that

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the exercise of due care, a [illegible] alleviation in the usual
requirement action. (Lemon v. Chanat Co. of Chicago, 330 Ill. 124)
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defendant agreed to make any payment nor is it contended that the defendant had any duty to make any payment.

Having this in mind it is clear that we must treat as surplusage the charge of failure to settle within the policy limits, since there is admittedly no policy involved and no duty to settle.

There are charges that the defendant failed to appear at a deposition or advise the plaintiffs of the deposition, failed to advise the plaintiffs of the trial setting, failed to call a motion up for hearing, carelessly or in bad faith attempted and failed to notify the plaintiffs of the trial, failed to use diligence in notifying plaintiffs of its intention not to appear in their defense by carelessly or in bad faith addressing said communication to an incorrect address although plaintiff was listed in the telephone directory and was still a policy holder in defendant's company and defendant had agents and claim adjusters living in Champaign County, and failed to appear at the trial and thus permitted large verdicts to be returned against the plaintiff. These allegations are sufficient to charge negligence.

Finally, with respect to the question of damages, the defendant has not challenged the sufficiency of the allegations to plead some injury for which the plaintiff should be compensated.

In the trial court a motion was filed to stike paragraphs of the complaint "to which specific objections have been specifically

defendant agreed to [illegible] paid [illegible] the defendant had any duty [illegible] judgment.

[illegible] this [illegible] pleases the course of [illegible] since there is [illegible].

There are charges [illegible] deposition [illegible] the plaintiff [illegible] the plaintiff of the trial [illegible] failed to call [illegible] hearing, carelessly [illegible] the plaintiff of the trial, failed [illegible] plaintiff of the [illegible] in their defense [illegible] lessly or in bad faith [illegible] communication to [illegible] address although plaintiff [illegible] in the [illegible] directory and was still a policy holder in defendant's company and defendants' agents and claim adjusters living in [illegible] County, and failed to appear at the trial and thus permitted large verdicts to be returned against the plaintiff. These allegations are sufficient to charge negligence.

Finally, with respect to the question of damages, the defendant has not challenged the sufficiency of the allegations to plead some injury for which the plaintiff should be compensated.

In the trial court a motion was filed to strike paragraphs of the complaint "to which specific objections have been specifically

made." Allowance of this motion would not have solved all the problems presented by this complaint.

Section 42 (2) of the Civil Practice Act provides, "No pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he is called upon to meet." The court, in the case of Kita v. Y.M.C.A. of Metropolitan Chicago, 47 Ill. App. 2d 409, 198 N. E. 2d 174, stated "The purpose of the law is to do substantial justice and the courts must exercise restraint in construing a statute which seeks to reach that end."

Thus we must excuse verbosity of certain allegations and paucity of other allegations so that this matter can be disposed of on other than a technical basis.

We have examined many cases in addition to those cited in this opinion relating to the sufficiency of pleadings. Inextricably woven into the fabric of each is the unmistakable course of our courts, ever striving to afford to each litigant an opportunity for a fair trial on the merits of the controversy.

Here the defendant had reason to complain of plaintiffs' complaint. But we perceive the remedy to be to strike those objectionable portions of the complaint rather than the complaint itself. If this is done there will remain allegations adequate to inform the defendant of the nature of the charges it will be called upon to meet.

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Immediately after entry of order striking out portions of

It is the order of this court that the judgment of the Circuit Court of Champaign County be reversed and the cause remanded to the Circuit Court of Champaign County for further proceedings not inconsistent with this opinion.

Reversed and remanded with directions.